108-342

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 237.

WILLIAM H. ELLIS, MASTER, AND ROBERT A. STEWART AND JOHN STEWART, OWNERS OF THE SHIP TORNADO, APPELLANTS,

vs.

THE ATLANTIC MUTUAL INSURANCE COMPANY OF NEW YORK, THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY OF LIVERPOOL, ENGLAND, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED JULY 6, 1880.

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1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

WILLIAM H. ELLIS, MASTER, & AL.
versus
CARGO SHIP TORNADO. } No. 8859.

TRANSCRIPT OF APPEAL FROM THE DISTRICT COURT.—FILED OCTOBER 25TH, 1879.

United States district court, district of Louisiana. In admiralty.

Libel.—Filed March 30th, 1878.

To the judge of the district court of the United States for the district of Louisiana:

The libel of William H. Ellis, master, and Robert A. Stewart, of London, and John Stewart, of St. Johns, New Brunswick, owners of the ship Tornado, exhibit this their libel against 5,195 bales of cotton and the proceeds of sale of such portion thereof *and* may have been sold, and against 1,540 pipe staves and 1,800 hogshead staves, being the cargo of said ship Tornado, and lately laden on board of said ship, and which
2 5,195 bales of cotton and proceeds of sale thereof and said staves are now in the custody of the marshal of the district aforesaid, under arrest in virtue of a warrant issued out of this hon. court at the suit of the New Harbor Protection Company of New Orleans vs. said Ship Tornado and cargo at the city of New Orleans, in the district aforesaid, and within the admiralty and maritime jurisdiction of this hon. court, and against all persons lawfully intervening for their interest therein, in a cause of contract civil and maritime.

And thereupon libellants do allege and articulately propound as follows, to wit:

First. That on or about the 24th day of February, 1878, the said ship Tornado, whereof said Wm. H. Ellis was master, and whereof the said Robert A. Stewart and John Stewart were and still are owners, being in the port of New Orleans, State of Louisiana, and bound to Liverpool, in the Kingdom of Great Britain, the said master at the request of
3 Messrs. Ranger, Fatman & Co., and the other parties whose names are set forth in the schedule hereto annexed and made part hereof, agreed to receive and take on board of said ship and to convey to Liverpool aforesaid, and there to deliver the same unto consignees, also named and set forth in the schedule hereto annexed and made part hereof, they, the said consignees, paying as and for freight therein the amounts in said schedule set forth, and which amount to £4,169 13s. 1, and for which the said 5,195 bales of cotton and 3,340 staves the said master gave bills of lading containing the ordinary usual exceptions.

Second. That afterwards, to wit, from the day of January until the 23d day of February, 1878, the said master, in pursuance of said agreement, did receive and take on board said ship and there was on the wharf,

ready to go on board said ship, 164 bales more for which bills of lading had been given as aforesaid, when on the 24th day of February, 1878, at 6 a. m., said ship was discovered to be on fire in her hold and
4 among said cargo, and that thereupon various efforts were made to *dis*tinguish said fire by means of carbonic-acid gas and water, which failed to extinguish said fire until said ship, from an accumulation of water injected into her hold, sank to the bottom of the river with three feet of water on her deck, and that after said vessel was sunk as aforesaid she was seized in the above-named suit of the New Harbor Protection Co. vs. said Ship Tornado and cargo for salvage, and was with her said cargo taken session of by the marshal of this hon. court, and raised while in said custody and possession under the supervision, direction, and control of said marshal.

Third. That after said vessel and cargo had been raised as aforesaid, being still in the custody and possession of the marshal of this hon. court, the master of said vessel representing all parties in interest as to said vessel and cargo, that said cargo might after receiving such attention, care, and handling in picking, drying, and rebaling as much thereof as
5 might be necessary, and which libellants aver might easily have been done, have been sent to its destination, and freight thereon have been earned, but which application to bond, owing to the opposition of libellants and intervening libellants in said suit of said New Harbor Protection Company vs. said ship and cargo, and especially of the opposition of the underwriters on said cargo was concerned, was denied and refused.

Fourth. That libellants, through their agents in New Orleans, Shultz & Co., had advanced and paid for the compressing and stowing said cargo in said vessel and other expenses incident thereto, and a detailed bill whereof is hereto annexed and made part hereof, the sum of $14,278.26, and the further sum of £198.72 railroad charges, for which libellants have a lien on said cargo as well as the proceeds of sale thereof.

Fifth. That under and by virtue of the contract for carrying said cargo forward as aforesaid, it was libellants' right as well as their duty and desire to dry, pick, and rebale so much of said cotton as might require
6 it, and which they aver could easily have been done to carry it to its destination, and earn said freight money for carrying the same, but which they have been unable to do because they have been denied the right to bond the same, owing to opposition of libellants and intervening libellants in said above-mentioned suit as well as of the opposition of underwriters on said cargo, and through whose intervention and opposition said cargo has been entirely taken away from said master, whereby and in consequence of which the whole and entire freight money agreed on for carrying said cargo forward, amounting to £4,169.13.1, became due and payable as well as said sum hereinbefore set forth for compressing and stowing said cargo and other expenses incident thereto, amounting to $14,278.26 and £198.7.2 railroad charges, for all of which sums libellants have a lien on said cargo, as well as the proceeds of sale thereof, all now in the possession and under the control of this hon. court.

Sixth. That all and singular the premises are true.

7 Wherefore libellants pray that process in due form of law may issue against 5,195 bales of cotton as well as the proceeds of sale thereof, and against 3,340 staves, being the cargo of the ship Tornado, said

proceeds of sale being now in the registry of this hon. court, and 500 bales of said cotton being now in the levee steam cotton-press, and that this hon. court will pronounce for the aforesaid demand and decree the same to be paid with costs, & for such other and further relief and redress as to right and justice may appertain and as this hon. court is competent to give in the premises.

(Signed) WM. H. ELLIS.
(Signed) THOS. J. SEMNES,
(Do.) RICHARD DE GRAY,
Proctors.

Sworn and subscribed to before me this 30th day of March, 1878.
(Signed) R. DEVONSHIRE,
D'y Clk.

Let admiralty process issue as prayed for, March 30, 1878.
(Signed) R. DEVONSHIRE,
D'y Clk.

8 ACCOUNT ANNEXED.

British ship Tornado, Capt. Wm. H. Ellis and owners, in ac't with Shultz & Co.

To paid for disbursements as follows:

Entrance to C. H.		3 75
Provisions to S. W. Pas.		55 35
Harbor master's dues		20
Quarantine "		30
U. S. tonnage "		516 30
Sundry C. H. permits		2 75
Duties on old iron		26 52
Transportation in harbor		15
Inward pilotage		76 50
Towage bill		1,118
Sundry telegrams		15 75
M. L. Navra's bill		2
Tarpaulin hire		40
Levee dues		308 15
Morrow & Westerfield, stores, &c		685 34
Butcher		155 35
Geo. Glidden " "		95 98
Geo. Canby, stevedore, taking out ballast, loading, &c		4,063 60
Sundry bills for extra insurance		439 16
Vegetables		11 50
Engineer's bill, P. C. Manz		27 20
Blacksmith		11 85
Commission for procuring freight, £3,971.2.0 5%, £195.11.1, ex., 4.84½	$961 99	
Less 4% tare on cotton	38 48	
		923 51
9 Advertising, stamps, blanks, &c		25

Fuel	52	
Compressing 5,195 bales, @ 75c	3,896	25
Cash to captain	1,610	75
Physician & medicine	50	70
	$14,278	26

E. & O. E. NEW ORLEANS, *M'ch* 14, 1878.

Admiralty warrant.—Issued March 30, 1878.

The President of the United States of America to the marshal of the district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded forthwith to seize and into your possession take the 5,195 bales of cotton as well as the proceeds of sale thereof, and 3,340 staves, being the cargo of the ship Tornado, said proceeds of sale being now in the registry of this hon. court, and 500 bales of said cotton being now in the levee steam cotton press, now libelled by William H. Ellis, master, & als., for the cause set forth in the libel now pending
10 in district court of the United States; that you do cite and admonish the owner or owners, and all and every other person or persons having or pretending to have any right, title, or interest in or to the same, to be and appear before a district court of the United States for the district aforesaid, to be holden at the city of New Orleans, on or before the third Monday from the service hereof, to show cause, if any they have or can, why the said cotton, its proceeds of sale, and staves should not be condemned and sold agr'eably to the prayer of libellant, and how you have executed this warrant that you make return according to law.

Witness the honorable Edward C. Billing, judge of the said court, at New Orleans, this 30th day of March, 1878, and the 102d year of the Independence of the United States.

(Signed) R. DEVONSHIRE,
D'y Clk.

Marshal's return.

Rec'd March 30, 1878, by the U. S. marshal, and on the 30' day of March, 1878, I seized and took into my possession the proceeds of
11 sale of cotton in case 11207, U. S. district court, in hands of registry of said court, and on the 1st day of April seized and took into my possession 523 bales cotton, now stored in levee steam cotton press in the city of New Orleans, also on same day seized the proceeds of sale of staves, in case 11207, U. S. dis't court.

(Sig.) C. R. STEELE,
D'y Marshal.

Order on marshal to sell cotton.—Feb'ry 28, 1878.

NEW HARBOR PROTECTION CO.
vs.
SHIP TORNADO, CARGO, &C. } 11207.

On motion of M. M. Cohen, proctor for libellant above named, and

on suggesting to the court that the whole cargo now being discharged from the ship Tornado is greatly damaged by water and some of it by fire, and will in all probability have ultimately to be sold, being in unfit condition to be sent to destination;

That the unnecessary expense of drayage and storage in presses
12 or elsewhere would greatly reduce the net value of the property saved:

It is ordered that the marshal of this district do sell the cotton on the levee as it comes out of the ship, in such lots as may accumulate from day to day, on two days' advertisement, and that the proceeds of said sales be held and deposited according to law.

Application by the master to rescind order of sale and for leave to bond ship and cargo.—Filed February 28, 1878.

NEW HARBOR PROTECTION CO.
vs.
SHIP TORNADO. } No. 11207.

On motion of Grover and Harding, proctors for claimant herein, and showing to the court that said claimant is desirous of and entitled to bond said ship and cargo, and that an order has improvidently issued in this case to sell said cargo on two days' advertisement, and showing that said order and said sale would and does work great injury to claimant,
13 Ordered that said libellant show cause on to-morrow, 1' March, 1878, at 11 a. m., why said order to sell should not be rescinded and claimant permitted to bond said cargo on furnishing the proper securities in an amount to be fixed by this hon. court.

MARCH 1, 1878.

Hearing and continuance of rule to bond.

The rule taken on yesterday to rescind the order of sale, and allow the claimant to bond, came on for trial—T. J. Semmes and Grover & Harding for mover; M. M. Cohen and J. McConnell for def'ts in rule—and after hearing argument, it is ordered that the rule be continued till this day at 7 p. m., and that in the mean time the parties take evidence on the condition of the cargo, and whether the same is or not a total loss.

MARCH 1, 1878—at 7 P M.

Hearing and submission.

The trial of the motion to rescind order of sale and allow claim-
14 ant to bond was resumed at the appointed hour, and after hearing the evidence and argument of counsel the court took time to advise, and directed that in the mean time, and pending the decision herein, the sale be suspended.

Claim of W. H. Ellis, master. Filed March 1, 1878, at 8½ p. m. by leave of court.

NEW HARBOR PROTECTION CO.
vs. } 11207
SHIP TORNADO & CARGO.

And now W. H. Ellis, master of said ship Tornado, intervening for their interest, interests of the owners of said ship and cargo, appears before this hon. court and makes claim to the said ship and cargo as the same are attached under the process of this court at the instance of the New Harbor Protection Co., and the said Wm. H. Ellis avers that he was in possession of said ship and cargo as the lawful bailee thereof, and as master of said ship at the time of the attachment thereof; and prays to defend accordingly.

15 (Signed) W. H. ELLIS.

Sworn to & subscribed before me this 1st March, 1878.

[SEAL.] (Signed) J. G. EUSTIS,
U. S. Commr. for Dist. of La.

MARCH 6, 1878.

Order allowing the bonding of the vessel, and such of the cotton as is in good order and stored, and to sell remainder, &c.—Order appointing W. C. Black trinity master.

NEW HARBOR PROTECTION CO.
vs. } 11207
SHIP TORNADO & CARGO.

On due consideration of the law and the evidence, and the argument of counsel with reference to the motion to rescind the order of sale and allow the claimant to bond the vessel and cargo,

It is ordered by the court that the claimant be allowed to bond the vessel and such of the cotton as is now stored in the levee steam cotton press, and which is in good order, and that the remainder of the cargo on board ship or upon the levee which is more or less damaged be
16 sold by the marshal after three days' advertisement and the proceeds deposited according to law, all questions as to freight being reserved.

It is further ordered that an appraisement of the vessel and of the whole cargo, whether in the press, on board ship, or on the levee, be made by Wm. S. Black, esq., the desire of the court being that said appraiser would act as a trinity master, assist the marshal in assorting the cargo, and give them all advice and benefit of his long experience in matters of this kind, with a view of securing a sale that would be to the best advantage of all concerned.

Letter from trinity master.—Filed 7th March, 1878.

N. ORL'S, *7th March*, 1878.

His Honor Judge Billings, U. S. circuit court:

17 After making a thorough examination of the cargo of the ship

Torrado, and the limited space she has in which to discharge cargo, I am clearly of the opinion that no sales can be made on the levee to advantage.

As far as I have been able to see, some bales are much more damaged than others, and as there is no levee room to assort cargo, and cannot be had even by removal of vessel, it is in my judgment absolutely necessary that the entire cargo be removed to a press yard, where it can be assorted and the bales in good condition sold by themselves, and those in bad condition by themselves. This course will, in my opinion, greatly inure to the benefit of all parties interested.

Col. Denis will remove the cotton from the landing as well as cargo as fast as landed, to his press, incurring all expenses attending, make proper separations in lots of 100 bales each, for the sum of 85 cents per bale.

This course I recommend to the court.

Respectfully,

W. C. BLACK,
Trinity Master.

18 *Order of court on foregoing letter.—March* 7, 1878.

Ordered that the communication from the trinity master be placed on file, and that his recommendation to remove the entire cargo from the landing to a press yard be carried out by the marshal.

Order amending order of 6' *March.—March* 7, 1878.

Ordered that the order entered on the 6th inst. be so modified as to direct that the funds received from day to day from the sale of the cargo be deposited in the registry of the court as received.

Letter from trinity mas'er.—Filed March 11, 1878.

NEW ORLEANS, 11' *March*, 1870.

To the honorable Judge Billings, U. S. district court:

SIR: I have carefully examined as far as discharged, comprizing about ⅔ds of the cargo of the ship Tornado, the condition of the cotton
19 landed from said vessel, and find that it is all damaged, and have no reason to suppose that the unlanded portion of the cargo will at all effect my appraisement; some by fire, and some by water only. A proper seperation has been made by the marshal, so that the cotton damaged by fire and water is to itself, and that damaged by water is to itself; and this has been done with a view to facilitate the sale of the cotton, and make each lot sell for its appropriate value.

The cotton damaged by fire and water I appraise at $24 per bale; that by water alone at $28 per bale. There being considerable loose cotton, I recommend that it be sold at so much per pound, and to this end appraise it to be worth three cents per pound, no allowance to be made for absorption of water.

Resp.,

W. C. BLACK,
Trinity Master.

20 *Order of court on foregoing letter.—March* 11, 1878.

Agreeably with Mr. Black's recommendation, it is ordered that all the loose cotton of the cargo of the ship Tornado be sold per pound weight, and that the marshal be notified; this modification is not in any wise to delay the sale heretofore ordered.

Modification of order of sale of loose cotton.—March 19, 1878.

Let the orders herein made be modified by substituting as follows: That the loose cotton be sold either in bulk or by the pound, in whole or in part, as, in the judgment of Mr. Black, may be calculated to produce the highest price.

Report of trinity master.—Filed 19th March, 1878.

NEW ORL'S, 19 *March*, 1878.

The honorable E. C. BILLINGS, judge U. S. dist. court:

I beg leave to report the following appraisement of cotton, part
21 of the cargo of ship Tornado, now at the levee steam cotton press: 164 bales (said to have been on board of said ship at time of accident) at $38 per bale; 153 bales and 2 crates, in all 155 bales, slightly damaged, @ $35 per bale; 180 bales, including one crate, @ $36 per bale.

W. C. BLACK,
Trinity Master.

Appraisement of vessel.—Filed March 19, 1878.

NEW ORLE'S, 19 *March*, 1878.

The Hon. E. C. Billings, judge U. S. district court:

After a careful examination of the ship Tornado I find that she is so much damaged by fire and other causes as to loose her value entirely for seagoing purposes, and therefore can fix no higher valuation for an appraisement than $7,000.

(Signed) W. C. BLACK,
Trinity Master.

Order to release vessel to Ellis & al. on bond for $5,000.—*March* 21, 1878.

22 On motion of Thos. J. Semmes, esq., and Grover & Harding, esqs., proctors for Ellis, master and claimant of the ship Tornado, tackle, apparel, and furniture. It is ordered that said ship be released from seizure and delivered to said claimant on his giving bond in the sum of $5,000, with Carl Kohn as surety.

Report of trinity master.—Filed 25th March, 1878.

To the Hon. E. C. Billings, judge U. S. dist. court, La.:

SIR: I beg leave to call the attention of your hon. court to my action in the case of the New Harbor Protection Co. vs. Br. ship Tornado.

Immediately upon receiving my appointment of trinity master in
23 the above case, I repaired to the ship Tornado to carry out the duties assigned to me by the order of your hon. court, & after surveying the situation of things, found it necessary to remove the cargo to a suitable place for proper examination & arrangement so as to place it in its most favorable light, and thereby secure in its sale its full market value. Upon my recommendation your hon. court authorized the removal of cargo to the steam levee cotton press, at a cost of 85 cents per bale; the removal was accomplished without unnecessary delay, and the wisdom of this measure was fully sustained in the enhanced prices obtained at the sale subsequently made, being largely in excess of any sale that could have been made at the ship's side.

Sale of damaged cotton, 4672 bales, aggregating the sum of $116,032.50. This sum you will doubtless find in the custody of your hon. court at this time.

Sound Cotton.—500 bales at the levee steam cotton press, ap-
24 praised by me for bonding, aggregating about the sum of $18,000.

Ship Tornado.—Upon examination find the ship to have no value for sea-going purposes, but for other purposes worth $7,000.

Respectfully,
(Signed) W. C. BLACK,
Trinity Master.

N. Orl's, *March* 23, 1878.

Rule by insurance companies to bond 500 bales.—Filed March 26, 1878.

New Harbor Protection Company
versus
The ship Tornado, cargo, and freight. } No. 11207.

25 On motion of J. McConnell, proctor for the Atlantic Mut. Ins. Co. of New York, the Factors & Traders' Ins. Co. of New Orleans, and others, insurers and claimants of cargo herein, and on suggesting that by order herein rendered on the 6th instant, the captain of said ship, W. H. Ellis, as lawful bailee, was authorized to bond certain cotton then on the levee steam cotton press amounting to about 500 bales, and on further showing, that said order was subsequently suspended so far as it authorized said captain to bond in consequence of the claim and opposition herein filed by these said claimants of the cargo to which reference is made as part hereof.

It is ordered by the court that W. H. Ellis, captain, do show cause on the 27th day of March, 1878, at 11 a. m., why the said order, so far as it authorizes him to bond said cotton, should not be rescinded and these claimants be authorized to bond the said cotton referred to in the said order of March 6, '78, and still remaining unsold.

26 *Order rule absolute, March* 27, 1878.

The rule taken on yesterday by the Atlantic Mutual Ins. Co. of New York, the Factors & Traders' Ins. Co. of New Orleans, and others came on for trial.

J. McConnell for movers.

T. J. Semmes for def't in rule.

And after hearing counsel it is ordered that the rule be made absolute, that the order of 6' March, 1878, so far as it authorizes W. H. Ellis, master, to bond the cotton in question, amounting to about 500 bales, be rescinded, and that the movers, the Atlantic Mutual Insurance Co. of New York, and the Factors and Traders' Ins. Co., of New Orleans, and others, be authorized to bond said cotton yet unsold.

On 3d April, 1878, the claimants of the cargo took a rule to consolidate suit 11229 with No. 11207, and on 15 April, 1878, it was ordered by the court that said suits be consolidated after hearing proctors on both sides.

27 APRIL 26, 1878.

Order to bond the 500 bales in three separate lots.

11207. NEW H. P. CO. *vs.* SHIP TORNADO.
11229. W. H. ELLIS *vs.* CARGO OF DO.

On motion of J. McConnell, proctor for the Atlantic Mutual Insurance Company of New York, the Factors' and Traders' Ins. Co. of New Orleans, and other claimants, underwriters, and substituted owners of the cargo of cotton herein libelled, and on suggesting a reference to the order herein rendered, authorizing them to bond the 500 bales of cotton now under seizure and in the custody of the marshal—

It is ordered by the court that the said 500 bales be bonded in three seperate lots, the 164 bales that were on the levee in one lot, the 336 bales that were taken out of the ship prior to the sinking of the ship
28 in two lots, one of 181 bales, claimed to have been taken out of the vessel by the stevedores, Drysdale & Sons, and the remaining in one lot of 155 bales, and that said lots be bonded by the several claimants in 18 seperate bonds according to the schedule marked A, annexed as part hereof.

Schedule marked A is the *the* various marks of the 500 bales.

Order to bond 23 bales of cotton—April 29, 1878.

11207. NEW H. P. CO. *vs.* SHIP TORNADO.
11229. W. H. ELLIS *vs.* CARGO DO.

On motion of J. McConnell, proctor for the Atlantic Mutual Insurance Company of New York, and others, claimants herein, and on suggesting to the court that a portion of the cotton intended to be shipped on the Tornado, forming part of the 5,195 bales, which arrived in this city from Memphis, and were never on said ship and which have not been
29 libelled for salvage herein, but have been libelled for freight herein by the said W. H. Ellis and others in said suit No. 11229, and which are now in the levee steam cotton press in this city under seizure by the marshal—

It is ordered by the court that said claimants have leave to bond said 23 bales on giving good security in the sum of $874.

Intervention of Marshal J. Smith & Co.

NEW HARBOR PROTECTION CO.
vs.
SHIP TORNADO, FREIGHT, CARGO, &C.

District court of the United States for the district of Louisiana. No. 11207. In admiralty.

To the Hon. Edward C. Billings, judge of the district court of the United States for the district of Louisiana:

30 The petition of intervention and answer of Marshal J. Smith & Co., a firm composed of Marshal J. Smith and Emile P. Roux, of the city of New Orleans, intervening for the interests of their principals to the libel of the New Harbor Protection Company, alleges as follows:

1st. By a commission dated the tenth day of October, one thousand eight hundred and seventy-seven, and signed by H. M. Hozier, secretary of the committee for managing the affairs of the underwriters at Lloyds, in London, in that part of the United Kingdom of Great Britain and Ireland called England, these intervenors were appointed to act as agents for the subscribers at Lloyds at the port of New Orleans, within the district aforesaid, subject to the instructions in said commission mentioned; and that by the said instructions they are amongst other things directed when salvage or remuneration is claimed for assistance rendered to vessels to attend the meeting of commissioners, magistrates, or other per-

31 sons legally authorized to determine the amount, in order to rebut any exaggerated statements on the part of the salvors by evidence of the master and crew, and they are likewise authorized and empowered by the said commission to attend to the interests of the subscribers at Lloyds in general, as by the said commission, now in the possession of these respondents, will more fully and at large appear, and to which for greater certainty these intervenors pray leave to refer.

2d. That these intervenors have been informed that the said ship Tornado and the freight were insured at said Lloyds by some or all of the underwriters therein, and that they have been instructed by cable telegrams of date the second and fourth of March, 1878, respectively to protect the interests of said underwriters as from said telegrams, now in the possession of these intervenors, more fully and at large will appear, and to which for greater certainty they pray leave to refer.

32 3d. That these intervenors do not yet know what is the exact interest of their principals in and to the said ship Tornado and her freight, nor what the same may prove to be, nor can they speak on this point with certainty, and therefore expressly abstain from making any claim thereto, but they annex hereto the freight list of said ship Tornado, showing that the amount of the freight inclusive of charges and primage to be £4,377.18.7 sterling, as stated by Shultz & Co., ship brokers and agents of said ship Tornado.

And now, answering said libel, these intervenors and respondents allege:

1st. That as to the facts set forth in articles 1st, 2d, 3d, 4th, and 5th of said libel these intervenors and respondents have not personal knowledge

and are ignorant, and therefore can neither admit nor deny the same, but leave the same to be proved by the said libellant.

2d. That all and singular the matters herein stated are true.

Wherefore intervenors pray on behalf of their said principals
33 that they may have leave to file this petition of intervention and answer, that they be allowed to intervene for the interests of their said principals, and that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn libellant in costs, and otherwise law and justice to administer in the premises.

(Signed) HUDSON & FEARN,
Proctors.

Emile P. Roux, being duly sworn, says that he is a member of the firm of Marshall J. Smith & Company; that he has read the foregoing petition of intervention and answer, and that the same is true of his own knowledge except as to matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

(Signed) EMILE P. ROUX.

Sworn to and subscribed to before me this 5' March, 1878.

(Signed) K. LOEW,
Comm'r Circuit Court La.

Let this intervention be filed.
March 5, 1878.

(Signed) EDWARD C. BILLINGS, *Judge.*

34 *Freight list annexed to foregoing petition, &c.—Filed March 5, 1878.*

[Office of Shultz & Co., ship-brokers and commission merchants, No. 21 Carondelet street.]

Freight list of the Br. ship Tornado, Capt. Wm. H. Ellis, from New Orleans for Liverpool.

No. B. L.	Shippers.	Consignees.	Numbers.	Packages.	Weight.	Rate.	Amt of freight.	Primage.	Total.
1	Ranger, Fatman & Co	...	100	Bales, cotton	50,866	11/16	86 2 0	.....	....
2	"	...	100	"	49,730	"	84 3 7	.....	....
3	"	...	100	"	50,928	"	86 4 1	.....	....
4	"	...	100	"	51,778	"	87 12 1	.....	....
5	"	...	100	"	51,872	"	87 16 1	.....	....
6	"	...	100	"	51,569	"	87 6 7	.....	....
7	"	...	100	"	52,036	"	88 11 9	.....	....
8	"	...	100	"	49,314	"	83 9 2	.....	....
9	"	...	100	"	50,668	"	85 15 4	.....	....
10	Claiborne & Co	...	556	"	249,572	1/2	389 19 1	.....	....
11	H. B. Beer & Co	....	50	"	22,045	22/32	33 0 2	.....	....
12	"	....	44	"	21,795	"	32 12 9	.....	....
13	"	....	100	"	55,744	"	83 9 5	.....	....
14	"	....	56	"	27,451	"	41 2 1	.....	....
15	Ranger, Fatman & Co	....	100	"	50,956	"	86 5 1	.....	....
16	"	....	100	"	51,264	"	86 15 6	.....	....
17	"	....	100	"	51,840	"	87 15 0	.....	....
18	Williams & Buckner	....	100	Bales, cotton	46,543	3/4	72 14 6	.....	....
19	Jas. T. Wood	....	200	"	92,555	22/32	138 12 4	.....	....
20	H. & B. Beer & Co	..	233	"	108,493	"	162 9 2	.....	....
21	"	....	169	"	80,160	"	120 0 8	.....	....
22	"	....	55	"	26,357	"	34 9 5	.....	....
23	"	....	61	"	29,157	"	48 13 2	.....	....
24	"	....	26	"	12,066	"	18 1 4	.....	....
25	"	....	251	"	115,433	"	172 17 0	.....	....
26	Ranger, Fatman & Co	....	100	"	51,568	11/16	87 5 0	.....	....
27	Anderson & Simpson	....	13	"	6,141	22/32	9 3 11	.....	....
28	Jas. T. Wood	....	150	"	69,396	"	103 18 5	.....	....
29	Williams & Crane	....	50	"	22,203	3/4	34 13 10	.....	....
30	Jas. T. Wood	....	100	"	48,722	22/32	72 19 1	.....	....
31	T. A. Woolley & Co	....	86	"	38,595	"	57 15 10	.....	....
32	Muir, Duckworth & Co	....	50	"	21,733	3/4	33 19 2	.....	....
33	Jas T. Wood	....	150	"	69,553	22/32	104 3 0	.....	....
34	"	....	69	"	31,454	"	47 2 0	.....	....
35	Muir, Duckworth & Co	....	200	"	93,056	3/4	145 8 0	.....	....
36	Ranger, Fatman & Co	....	40	"	20,690	11/16	35 0 6	.....	....
37	Muir, Duckworth & Co	....	20	"	9,056	3/4	14 3 0	.....	....
38	Williams & Crane	....	50	"	22,531	"	35 4 1	.....	....
39	Ranger, Fatman & Co	....	100	"	50,940	11/16	86 4 9	.....	....
40	A. A. Paton & Co	....	100	"	49,800	3/4	77 16 3	22 0 9	....
41	Watson & Hill	....	111	"	55,920	"	87 7 6	24 15 2	....
42	"	....	81	"	38,139	"	59 11 10	16 17 8	....
43	E. Hobart & Co	....	50	"	25,612	"	40 0 4	11 6 9	....
44	"	....	50	"	25,178	"	39 6 10	11 3 6	....
45	"	....	50	"	24,266	"	37 18 3	10 14 10	....
46	"	....	51	"	26,476	"	41 7 4	11 14 5	....
36									
47	E. Hobart & Co	....	55	"	27,078	1/2	42 6 2	11 19 9	....
48	Do	....	50	"	24,755	"	38 13 7	10 1 11	....
	E. Hobart & Co	....	51	"	25,409	"	39 14 0	11 13 4	....
	A. A. Paton & Co	....	100	"	49,300	"	77 0 7	21 16 6	....
	E. Hobart & Co	....	51	"	25,597	"	39 19 11	11 1 0	....
	"	....	50	"	24,961	"	39 0 0	11 5 10	....
	"	....	56	"	26,815	"	41 18 0	11 15 9	....
	"	....	1540	pcs. single pipe staves.		P ⊕ £6 10 0	6 8 0	.....	....
			1800	hhd. staves	ex.	6 10 0	9 15 0	.....	....
			5195	bales cotton	2,505,427	£	3971 2 0	198 7 2	....
						£	198 7 2	.....	....
				Frt. with	charges	£	4169 9 2	.....	....
					5 % prim.		208 9 5	.....	....
					Total...	£	4377 18 7	.....	....

E. & O. E. NEW ORLEANS, *March* 2, 1878.

(Signed) SHULTZ & Co.,
Per EDWIN F. DOLAN.

37 *Petition on behalf of subscribers at Lloyds to rescind order for sale of cargo.—Filed March 5, 1878.*

NEW HARBOR PROTECTION CO.
vs.
SHIP TORNADO, &C. } No. 11207.

U. S. district court for the district of Louisiana. In admiralty.

To the Hon. Edward C. Billings, judge of the district court of the United States for the district of Louisiana.

The petition of Marshal J. Smith and Company on behalf of their principals, the subscribers at Lloyds, respectfully shows:

1st. That your petitioners have filed herein a petition of intervention on behalf of their said principals, as from said petition of intervention, made part hereof, fully will appear.

2d. That upon the application of libellant herein an order has been granted directing the sale of the cargo of said ship Tornado.

3d. That a claim for said ship Tornado, her freight, cargo., &c., libelled herein, has been made by the master of said ship Tornado.

38 4. That a motion has been made on behalf of said master of the ship Tornado and claimant aforesaid to rescind the order directing the sale of said cargo.

5. That the various underwriters and insurers on said cargo have united with libellants, and, by the production of witnesses and employment of counsel, opposed the rescinding of said order of sale.

6. That none of said underwriters on the cargo have, by filing any claim to said cargo, or part thereof, or by any pleadings of record, intervened in said cause.

7. That it does not appear from the record that any of said underwriters on the cargo have accepted an abandonment, as in case of total loss thereon, and have hereby become the owners thereof.

8. That until said underwriters on the cargo shall have accepted such abandonment, paid such total loss, filed their claims as owners, and
39 intervened herein by proper pleadings, they are utterly without any standing in court, and have no right to be heard in relation to the disposition of said ship and cargo.

9. That it is a matter of no concern to libellant whether the cargo of said ship be sold here or abroad, provided the claimant of said ship and cargo, namely, the master, give bond for the value of the same; and libellant has no interest in urging a sale of said cargo here when the master of said ship is ready and able to furnish ample bond, with security, to respond to whatever salvage or remuneration may be decreed in favor of libellant.

10. That no one but the owners of said cargo have the right to urge the delivery of said cargo and its sale here; that said owners, however much it might be to their interest to have said cargo sold here, have no right to demand its delivery and sale without payment of full freight thereon, provided said ship, with certain repairs needed, will be
40 able, within a reasonable time, to carry forward the same.

11. That it is the duty of the master of said ship to oppose the sale of said cargo and ship, and to cause the same to be put in proper con-

dition, and, with said cargo, to proceed on the voyage contemplated; that petitioners are informed and believe that it is his purpose and desire to do so, unless prevented by the power of this hon. court, if the same be possible, or to forward said cargo by another ship should the ship Tornado be incapable of repairs for that purpose.

12. That not only has the master of said ship Tornado, as also the owners thereof, the right to carry forward said cargo, and to earn freight, but petitioners' principals, to wit, the subscribers at Lloyds, who have insured said freight, have the right to insist that the same be carried forward, and freight earned by said ship.

41 13. That it has not been shown, nor can it yet be shown, that the said ship Tornado cannot be repaired within a reasonable time, so as to be able to carry forward said freight; that it has not been nor can it be satisfactorily shown, all the evidence considered, that it is for the interest of all parties to sell said cargo as it lies on the wharf, without any examination, inspection, or ascertainment of actual damage suffered; that such sale would be premature, unwise, and necessarily result in a great sacrifice, the real condition of said cotton composing said cargo being unknown; that about one-tenth of said cargo, to wit, about five hundred bales of cotton, for which bills of lading had been signed, are almost, if not entirely, uninjured, and that from the appearance of the cotton already taken out of said ship it is reasonable to suppose that at a cost, trifling as compared with its real value, said cotton can be dried and prepared so as to be forwarded to its destination, and therefore petitioners, for their

42 principals aforesaid, oppose the sale thereof.

14. That petitioners are informed and believe that several of the underwriters on said cargo, who oppose the rescinding of said order of sale are stockholders in the corporation of said New Harbor Protection Company, or in other boats which claim to have rendered salvage services to said ship Tornado, and are directly interested in the salvage claimed by libellants, and expect to participate therein, and hence have united with said libellant to urge the sale of said cargo here, with utter disregard of the rights of the master and owners of said ship and cargo and of the insurers of said ship and freight.

15. That if said underwriters on cargo, and said libellant be allowed by this hon. court to forcibly deprive the master of said ship Tornado of the possession of said cargo, and to cause it to be sold, petitioners' said principals will be subjected to great damage as insurers of said freight

43 and ship, for which there will be no adequate relief possible.

Wherefore petitioners, on behalf of their said principals, pray that the order to sell said cargo be rescinded and for general relief.

(Signed) HUDSON & FEARN,
Proctors.

Personally appeared Emilé P. Roux, who, being duly sworn, says that the facts set forth in the foregoing petition are true so far as the same are to his personal knowledge, and that such as are stated on information to be true; that he is a member of the commercial firm of Marshal J. Smith & Co., the petitioners herein.

(Signed) EMILÉ P. ROUX.

Sworn to and subscribed before me this 5' March, 1878.

(Signed) K. LOEW,
Comm'r Circuit Court.

Intervening Claim of the Underwriters.—Filed March 19, 1878.

NEW HARBOR PROTECTION CO.
vs.
SHIP TORNADO, CARGO & FREIGHT. } 11207.

44 To the Hon. E. C. Billings, judge of the district court of the United States for the district of Louisiana.

1st. The Atlantic Mutual Insurance Company of New York, a corporation created under the laws of the State of New York, and domiciliated in the city of New York, of which James A. Whitlock is special agent in the city of New Orleans.

2. The British & Foreign Marine Insurance Co., of Liverpool, a corporation created under the laws of Great Britain, and domiciliated in Liverpool, England, of which Pim, Forwood & Co. are the agents in New Orleans.

3d. The Standard Marine Insurance Co. of Liverpool, England, a corporation created under the laws of Great Britain, and domiciliated in Liverpool, of which George Mather is agent in New Orleans.

4. The Factors and Traders' Insurance Company, of New Orleans, a corporation created under the laws of Louisiana, domiciliated in New Orleans, of which Edward Palfrey is president.

5th. The New Orleans Insurance Association, a corporation created
45 under the laws of Louisiana, and domiciliated in New Orleans, of which Wm. A. Bell is acting president.

6. The Insurance Company of North America, a corporation created under the laws of Pennsylvania, and domiciliated in Philadelphia, of which Marshall J. Smith & Co. are agents in New Orleans.

7. The Phœnix Insurance Co. of Brooklyn, a corporation created under the laws of the State of New York, and domiciliated in Brooklyn, and of which Marshall J. Smith & Co. are agents in New Orleans.

8. The Rhenish Westphalian Lloyds Marine Insurance Company, of M. Gladbach, a corporation created under the laws of Germany, and domiciliated in Munchen Gladbach, Germany, of which S. A. Moritz is agent in the city of New Orleans.

Severally intervening in the above-entitled and numbered cause for their interests in the cargo of the ship Tornado or proceeds thereof, appear
46 before this hon. court and claim the said cargo unsold, and proceeds of said cargo sold, or that may be sold, and state:

1. That the said ship Tornado, cargo, & freight have been libelled and seized under admiralty process herein at the suit of said libellant, and numerous other intervening libellants for salvage, and by an order herein rendered on the 6th day of March, 1878, the captain, as lawful bailee, was authorized to bond the vessel and such portion of the cargo as was then stored in the levee steam cotton-press, and the remainder of the cargo on board ship, or on the levee, was ordered to be sold, and to which order reference is made as part hereof.

2d. That the entire cargo of the said ship except a few staves consisted of cotton, numbering in all 5,195 bales, of which 164 bales were on the levee at the time of the fire, and had not been on board the ship, and were not damaged, and 336 were rescued from the ship on the 1st, 2', &

47 3d days of the fire, and before there was much damage to the cargo, and before the said ship sunk.

3d. That your claimants were and are the underwriters of the whole of said 5,195 bales of cotton constituting the whole cargo, except a few staves as aforesaid of said ship, as follows:

No. 1.	The Atlantic Mut. Ins. Co. of New York	2,167	b. c.
" 2.	British & Foreign Marine Ins. Co. of Liverpool	939	"
	do. do. do.	111	"
" 3.	Standard Marine Ins. Co.	556	"
" 4.	Traders & Factors " " of New Orleans	571	"
" 5.	N. Orl's Ins. Ass'n of N. O.	484	"
" 6.	Ins. Co. of North America of Philadelphia	200	"
" 7.	Phœnix Ins. Co. of Brooklyn	81	"
" 8.	Rhenish Westphalia Lloyd Ins. Co.	86	"
	Total	5,195	"

That the marks of said cotton and other necessary details will appear from the schedules and exhibits herewith filed as part hereof, and
48 to which reference is made for brevity in pleading.

1. That the said ship Tornado is so badly burned and strained as to be unfit for repairs, the cost of which would exceed the value of the ship when repaired, which facts, with other details showing the utter destruction of said ship will appear from the annexed official survey made part hereof.

5. That the damage to said cargo and ship by fire and water, referred to in said libel, were so great as to cause a constructive total loss of said cargo and ship, and absolutely terminate the voyage, and is so considered and treated by all your said claimants, the said cargo as the said agents in this city are advised having been abandoned to them, and the abandonment accepted and payments made or being made by all said claimants as in case of total loss.

The following-named claimants having already paid total loss on the portions of cargo insured by them, as aforesaid, to wit:

49	1. The Atlantic Mut. Ins. Co of New York	2,167	b. c.
	2. The British & Foreign Marine Ins. Co. of Liverpool	1,050	"
	4. Factors & Traders' Ins. Co. of New Orleans	571	"
	5. N. O. Ins. Ass'n of N. O.	484	"

That some of your claimants have already had returned to them the bills of lading for portions of said cotton which they file herewith as part hereof, and respectfully pray leave of the court for time to file the remainder of said bills of lading for the remainder of the cargo should the same be deemed necessary, as soon as received.

7. That by reason of the premises your claimants have become and are the bona fide, absolute, & sole owners of said entire cargo of cotton so insured by them respectively as aforesaid, and of the proceeds of such part thereof as has been or may be sold.

8th. That owing to the damage to said cargo, and the destruc-
50 tion of the marks thereon, the various lots insured are undistin-

guishable, with but few exceptions (except the cotton which the captain as bailee has been authorized to bond); and therefore your claimants have and so appear to have a common interest in defending against the said libellant and intervening libellants herein.

9. That by reason of the premises the said captain of the Tornado is without right or authority to bond said cargo of cotton, or any portion thereof, and your claimants respectfully pray that the order therein rendered on the 6th day of March, 1878, so far as it allows the said captain to bond the cotton then in the levee steam cotton-press, which lot of cotton amounted to 500 bales, may be modified so as to direct that your present claimants be allowed to bond the same, and further pray that said cotton and the proceeds of the cargo sold, or that may be sold, be restored to them.

And thereupon said claimants pray for leave of the court to file
51 this claim, and that the orders and relief herein above prayed for may be granted to them, and that they may be permitted to appear herein by counsel, and by answer and proper pleadings and proof defend the said cargo and the proceeds thereof from any and all demands now made against it by the libellants and intervening libellants, or other parties, or demands that may be asserted against the same, and that otherwise right and justice be administered in the premises.

J. McCONNELL, *Proctor.*

The undersigned being severally sworn, say that the facts stated in the foregoing claim are true to the best of their knowledge, information, and belief.

JAS. A. WHITLOCK,
Special Agent Atlantic Mut. Ins. Co.
E. A. PALFREY,
Pres'd't Factors & Traders' Ins. Co.,
p. p., PIM, FORWOOD & CO.
ARTHUR J. MITCHELL,
Ag'ts of Brit. & Foreign M. Ins Co.
W. A. BELL,
52 *Pres't pro tem. of New Orleans Ins. Ass'n.*
GEO. MATHER,
Agent Liverpool Underwriters' Association and Standard Marine Ins. Co. (Except that as to the facts in regard to the Standard Marine Ins. Co. he is yet without positive information, and is uncertain, but believes the facts to be as stated.)
S. A. MORITZ,
Agent Rhenish Westp'l'a Lloyd at M. Gladbach.
MARSHALL J. SMITH & CO.,
For the Insurance Co. of N. America, at Philadelphia, and Phœnix Ins. Co. (We believe the abandonment has been, or certainly will be, made and accepted.)
[SEAL.] J. G. EUSTIS,
U. S. Comm'r for Dist. of La.

Order of court on foregoing claim.—March 19, 1878.

Let this intervening claim be filed, and let the claimants therein named be allowed to appear and defend their interests as such, by answer or otherwise, as prayed for.

53 Let the order of this court, dated March 6, 1878, so far as it allows the captain of the ship Tornado to bond certain cotton, be suspended until the further order of the court, and let the intervening claimants be allowed to deposit with the clerk of this court, as soon as received by them, respectively, the bills of lading of the cotton insured by them.

M'ch 19, 1878.

(Sig.) EDWARD C. BILLINGS, *Judge.*

Intervening answer of the underwriters.—Filed April 25, 1878.

NEW HARBOR PROTECTION CO. *vs.* SHIP TORNADO, CARGO, & FREIGHT.	11207.	Consolidated cases.
W. H. ELLIS, MASTER, AND OTHERS *vs.* CARGO OF THE SHIP TORNADO.	11229.	

To the honorable E. C. Billings, judge of the district court of the U. S. for the district of La.:

The intervening answer of—

54 1. The Atlantic Mutual Insurance Company of New York, a corporation created under the laws of New York, domiciliated in New York City, and of which James A. Whitlock is special agent in the city of New Orleans.

2. The British and Foreign Marine Insurance Company of Liverpool, a corporation created under the laws of Great Britain and domiciliated in Liverpool, England, of which Pim, Forwood & Co. are the agents in New Orleans.

3. The Standard Marine Insurance Company of Liverpool, England, a corporation created under the laws of Great Britain and domiciliated in Liverpool, and of which Geo. Mather is agent in New Orleans, and of the Indemnity Insurance Company of London, England.

4. The Factors' & Traders' Insurance Company of New Orleans, a corporation created under the laws of Louisiana and domiciliated in New Orleans, and of which Edw'd Palfrey is president.

5. The New Orleans Insurance Association, a corporation created
55 under the laws of the State of Louisiana and domiciliated in New Orleans, and of which Wm. A. Bell is president pro tem.

6. The Insurance Company of North America, a corporation created under the laws of Pennsylvania and domiciliated in Philadelphia, and of which Marshal J. Smith & Co. are agents in New Orleans.

7. The Phœnix Insurance Company of Brooklyn, a corporation created under the laws of New York and domiciliated in Brooklyn, and of which Marshall J. Smith & Co. are agents in New Orleans.

8. The Rhenish Westphalian Lloyds Marine Insurance Company of M. Gladbach, a corporation created under the laws of Germany, and of which S. A. Moritz is agent in the city of New Orleans,

intervening for their interests in the cargo of cotton and proceeds of cargo of the ship Tornado to the libels and amended libels of the said libellants, the New Harbor Protection Company, and W. H. Ellis, master, and others, as well as the various intervening libellants, answers and alleges as follows:

56 I. These respondents and claimants now refer to and adopt as part of this answer the allegations and averments made in and the exhibits attached to their intervening claim filed herein on the 19th March, 1878, as if now specially reiterated.

II. That your respondents and claimants, as underwriters, have accepted abandonment from the shippers, and paid a total loss on said cargo of 5,195 bales of cotton and the proceeds of said cotton as follows:

1st. Atlantic Mutual Insurance Co. insured 2,167 b. c. for ...	$132,925
2d. British & F. Marine, insured 1,050 b. c. for.....	48,474
3d. Standard Marine & Indemnity Ins. Co. of London, insured 556 b. c. for	26,800
4th. The Factors' & Traders' Ins. Co., 484 b. c. for.....	22,200
6th. Ins. Co. of North America, insured 200 b. c. for	11,000
7. Phœnix, of Brooklyn, ins. 81 b. c. for	4,400
8. Rhenish Westphalian Lloyds, insured 86 b. c. for.....	4,660
Total, 5,195.....	$276,159

57 III. That for purposes of brevity in pleading an agreement in writing was made in the said suit No. 11207, and signed by all of the proctors of record in behalf of the libellants therein, and of all the intervening libellants, as follows, to wit:

To save costs and unnecessary labor it is agreed that the intervening claimants, the insurers of the cargo, in defending be required to file only one answer setting up any matters of special defense, and that the allegations of the libel and interventions herein be held to be specially denied (except as may be admitted by their said answer) and strict proof required as if answers had been duly prepared and filed as to each libellant and intervenor, the original of which stipulation in writing is annexed in the margin and made part hereof.

IV. Further answering in regard to the facts and incidents of the fire on said ship, your respondents charge that the facts are not correctly stated in said libels and intervening libels, but they are informed and charge the truth to be as follows:

58 That on Sunday, February 24, 1878, about 6 o'clock a. m., smoke was discovered issuing from the main hatch; the fire-alarm was sounded immediately; the crew then on board, consisting of six officers and about 12 men, went resolutely to work, and then engines and firemen of the fire department of New Orleans were quickly on the spot, and were working effectively with water to extinguish the fire, which was thrown down the main hatch chiefly.

That the position of the ship was favorable to aid from the fire engines, as she lay securely moored to and alongside the wharf opposite post No. 23,

in the 3d district, and entirely within the fire limits of said district and city.

That after said labors of the crew and the fire department had continued about an hour and a half, the tug Protector arrived and proposed to Capt. Ellis to extinguish the fire very speedily (in less than an hour) by the use of carbonic-acid gas, at the same time expressly stipulating in the event the Protector failed to utterly extinguish the fire with gas, no charge whatever would be made for her services.

That upon these terms Captain Ellis permitted the Protector to take charge of the ship, which, after six hours experiment, proved a failure, and the fire companies aforesaid, under the guidance of their chief, Capt. Thomas O'Connor, again played three streams of water into the ship, cutting the decks in places for that purpose.

That at 6 p. m. of the 24', as the smoke seemed again on the increase, a renewed attempt with gas was made on the same terms by the Protector, which continued through the night with similar unsuccessful result as in the first attempt.

That accordingly, on the morning of the 25', the fire-engines and the crew of the vessel again went to work pumping in water, aided by the tugs Aspinwall and Charlie Wood, the Protector then pumping out water, the stevedores Drysdale & Sons and Canby, under directions of the captain, being engaged in taking out cotton.

That as the smoke continued to increase, the captain concluded to fill the ship with water to extinguish the fire, but not so as to sink the ship.

That on the 26th this work progressed favorably, the work of unloading going on at the *the* same time, by the stevedores' men, and the fire was nearly extinguished, the water in the hold being within four *weet* of the upper or main deck; the captain of the Tornado then directed the engines and tugs to cease further pumping into the ship, and ordered them to promptly place their suctions in the ship and pump her out.

That instead of their continuing at work with their suctions pumping out, the tugs, among which was the Protector, Aspinwall, and Charlie Wood, unaccountably, and without notice to the captain of the Tornado, or to the men then engaged in taking cotton out of the ship Tornado, suddenly and without proper cause or excuse, abandoned the ship Tornado, and caused her to settle down and sink, which occurred in about an hour and a half after the tugs had so abandoned her.

That the captain and officers of the Tornado called and importuned the said tugs Protector, Aspinwall, and Charlie Wood, and others, to return and by the use of their suctions prevent the sinking of the ship, but in vain—they made no answer.

That previous to the captain of the Tornado having ordered the filling of the ship as aforesaid with water, he first took extraordinary precautions to make the ship fast and secure to the wharf and levee by chains and cables and manilla ropes of great size and strength, fastened on shore to the wharf and to posts planted along the levee, for purposes of mooring vessels, and made purposely capable of meeting a great strain, and fastened on the ship, to the several masts above and below and through the channels of the ship also.

The captain having previously also caused soundings of the depth of

water of the river outside the vessel to be taken to be assured of the fact that there was no danger of loss of the ship by slipping or sliding out, if properly secured to the shore, as she was then made.

That in consequence thereof of the desertion and abandonment by the said tugs, the ship, on the evening of the 26th, at 7 or 8 o'clock p. m., settled down upon the bottom, so that the water was above her main deck, but with the rails of the bulwarks above water.

On the morning of the 27th additional precautions were taken by the captain, and he, with his crew and employees, made the vessel perfectly secure in her position, rendering her free from danger of sliding out or falling into deep water.

63 That about midday of the 27th, the Tornado, cargo and freight were seized and taken into possession by the marshal of this hon. court at the suit of the libellants, the New Harbor Protection Company and other libellants herein.

That at about the same hour, B. D. Wood and some others, aided and assisted by the officers and crew of the ship, fastened canvas around the upper part of the ship by sinking it with weights to a depth a little below the bulwarks, and tacking the canvas on the rails of the bulwarks which were above water, the divers at the same time stopping the hause pipes, scupper-holes, &c., which were at a greater depth than five feet below the water or upper deck of the ship, the said work of fastening up the holes and placing the canvass being performed without great danger or peril of any kind.

That at about sundown of the 27th, the tugs Aspinwall, Protector, and Charlie Wood, Belle Darlington, Continental, Ella Wood, No. 2, Harry Wright, Norman, Rio Grande, N. M. Jones, and others

64 encircled the ship, but could and did perform no effective service with their suctions in pumping out during the night, because owing to the darkness and the action of the current in the darkness, the canvass was not kept close to the sides or openings in the bulwarks.

That on the morning of the 28' the work of pumping out said ship was begun in earnest and effectively and with such ease and dispatch that by 9 o'clock a. m. the ship was raised out of the water sufficiently to enable the stevedores to begin taking out cotton, and by 12 o'clock m. of the same day the water was nearly all pumped out by the fire company, the work of a few hours, if done continuously.

V. Now, respondents are informed and charge the truth to be, that the entire work of pumping out the ship Tornado as aforesaid was unattended with peril or danger of any kind, and could have been accomplished; as they are informed and believe by any two of the larger tugs, such

65 as the Protector, the Norman, or the Rio Grande in ten hours' time; that a reasonable & full compensation for the entire work of pumping out said ship as aforesaid, as they are informed and believe and charge, ought not to exceed the sum of $500.

VI. Respondents are informed and charge the truth to be that, at and from 12 o'clock m. on Thursday the 28' day of February the said ship Tornado was raised out of the water alongside the wharf, was free from all danger of sinking, or again taking in water as there was then no holes under the water line, as she then lay and that if the innumerable fleet of tugs, large and small, claiming salvage and compensation extraordinaire

herein, saw fit to lay around the ship, even against the protest of the captain of the Tornado, such lying around does not and cannot support the demands set up in their libel and interventions herein.

VII. That all the work of discharging the cargo by the stevedores progressed thereafter without further interruption than occurred
66 from the levee and wharf becoming blockaded with the discharged cotton, and from the delay caused by the abortive attempt of the captain of the Tornado, aided by his agents Schultz & Co. to set aside the order of this hon. court, which had been applied for and obtained by the salvors herein on the 28th of February, 1878, maintained after hearing, by decree rendered on the 6th day of March, 1878, directing the marshal to sell the cotton on the levee as it came out of the ship, in such lots as might accumulate from day to day, on two days' advertisement, the gross proceeds of the sales of the cotton sold reaching the sum of $116,032.50 with 500 bales still remaining in the custody of the marshal.

VIII. Further answering, your respondents are informed and therefore aver and charge the truth to be that, of the said 5,195 bales of cotton, 164 bales never were put on board said ship, but were lying on the wharf or levee and never had any salvage, for the reason that they never were on board said ship nor on the water.

67 That 336 bales of cotton were taken out of said ship by the stevedores under the direction and orders of the captain on the 24' 25' and 26' days of February, 1878, before the sinking of said ship, and therefore as to them no claim of any kind exists in behalf of parties working after those dates, or in pumping out, or in assisting to raise said vessel. That said 500 bales now are in the press in custody of the marshal and will be bonded in separate lots so as to preserve and maintain thereon and thereto the respective rights and defenses of all parties interested.

IX. That respondents are informed and charge the truth to be that, during the progress of the unloading of the ship after the sinking, a portion of the said cotton on the levee again took fire, the flames of which were promptly extinguished by the fire department, who faithfully performed their public duty by remaining by the cotton until it was stored, and that the necessity for their engines and some of their men so remaining was demonstrated by the incident above stated.

68 That there was not the same or any necessity for the tugs to remain, as the fire could not be revived in the cotton aboard the ship after she had been sunk, as aforesaid.

X. Further answering, respondents say that they have been placed at great disadvantage in preparing this defense herein, as also in caring for their interests as underwriters upon the cargo, by the conduct of W. H. Ellis, captain of the Tornado, who neglected and refused (through the advice and co-operation of his agents, Schultz & Co.) to advise and confer with these respondents or their agents, as was his duty to do, as to the conversation of their interests as underwriters upon said cargo.

That they repeatedly cautioned the said captain verbally, and in writing, against making contracts, especially with reference to the handling and storage, &c., of the said cargo, when rescued, which proffered advice and co-operation, extended in the interests of all concerned, was rejected
69 or disregarded upon unfounded pretext, and improvident and illegal contracts made or attempted to be made by him without their

knowledge or consent, and greatly damaging to the interests of the owners of the cargo, and to your respondents as underwriters thereon, and afterwards substituted owners.

That in consequence of said conduct of said captain and other acts of record showing strong bias against your respondents, and other acts of like bad faith, showing an utter disregard of his obligations to protect their interests, they are not bound or affected by any of his acts or attempted contracts in the premises.

They further charge that the said captain made no defence whatever against the salvors or their claims, and when requested to aid your respondents and their counsel with information as to the facts necessary to enable them to prepare their defence herein, he refused to do so.

That long after the said ship had been in the custody of the marshal and the power of the said captain and his said agents had utterly ceased for such purposes, even as late as the 16' March, 1878, did the same captain and said agents attempt to give validity and binding force to three bills of the tugs Norman, Rio Grande, and Harry Wright, amounting in the aggregate to $40,000.00, for pumping, &c., which, as respondents have already shown, were utterly unfair and extortionate, and without any binding force whatever upon these respondents, but were also collusive over charges made and approved in bad faith, and utterly void.

XI. Further answering in this connection specially the claim of Thos. O'Connor for $19,790.00, and also by way of peremptory exception thereto, these respondents plead and say:

1st. That upon the face of this said libel, the said O'Connor cannot recover for want of a just cause of action in a court of admiralty.

2. That the said O'Connor cannot recover in a court of admiralty for the services alleged in the petition to have been rendered on land, and therefore there is no jurisdiction in this court, sitting as a court of admiralty over said demand.

3. That the said O'Connor was, at the time of the rendition of the alleged services, chief of the fire department of New Orleans, and all that was done by him and those in his employ to aid him, as detailed in his petition, was done as a matter of duty, or in the line of their duty as part of the fire department of the city of New Orleans, and therefore they cannot claim or receive salvage or other compensation therefore, nor can he, the said O'Connor, or his said superintendents or employees, be salvors.

4. That the said O'Connor, as chief, and the same parties employed (as alleged by him), were paid by contract with the city of New Orleans and the Firemen's Charitable Association to extinguish all fires within the corporate limits of said city, and the said steam fire-engines and the apparatus, hose, axes, and other implements belonging to the said fire companies as part of the said fire department and association organized for public purposes, and therefore no charge can be made or maintained in this court or elsewhere by the said O'Connor as an individual for the use of said property.

5. That the said O'Connor cannot in this form assert or claim personally for salvage services really rendered by the fire department and firemen with the fire-engines of the city of New Orleans.

6. That there is no lien whatever upon said cargo or its proceeds in favor of said O'Connor that can be enforced in this hon. court.

XII. Further answering, these respondents say that of the 5,195 bales of cotton which was to have constituted the whole cargo of said ship Tornado, there were 23 bales shipped from Memphis, via the railroad, which did not reach this city until after the 24' Feb'y, 1878, and in consequence of the fire were never taken to the said ship, but were stored in the levee steam cotton-press by the said W. H. Ellis, master, and from part of the cargo of said ship, which was insured by your respondents and which has been abandoned to them and upon which they have paid total
73 loss and of which they are claimants, and therefore the sole and exclusive and absolute owners.

Wherefore these respondents pray that the demands of the libellants and several intervening libellants herein be rejected entirely as salvage claims, and were shown by the evidence to possess any merit, may be reduced to an amount that will be just, moderate, and reasonable compensation pro opere et labore, and claims shown to have been made extortionate purposely or collusively may be rejected at the cost of those making the same, and finally that this honorable court will decree that the respondents and claimants be recognized and adjudged to be the absolute and sole owners of the said cargo of cotton, and of the proceeds *of the proceeds* of the sales thereof, and that the surplus of the said proceeds in the registry of the court, after the allowance of the reasonable and moderate compensation aforesaid, *and* paid to these respondents.

74 And these respondents will ever pray, &c.

(Sig.) J. McCONNELL, *Proctor.*

The undersigned being severally sworn, say that the facts and allegations contained in the foregoing answer, are true to the best of their information, knowledge, and belief.

(Sig.) JAS. A. WHITLOCK,
Special Agt. Atlantic Mut. Ins. Co.
E. A. PALFREY,
Pres't Factors & Traders' Ins. Co.
p. p. PIM FORWOOD & CO.,
ARTHUR J. MITCHELL,
Agt. Brit. Fire M. Insurance Co.
MARSHAL J. SMITH & CO.,
Agents of North American & Phœnix Ins. Co.
GEORGE MATHER,
Agt. Standard Marine Ins. Co. of Liverpool, Underwriters' Association.
S. A. MORITZ,
Agt. of Rhenish Westphalian Lloyds.
WM. A. BELL,
President pro tem. N. O. Ins. Association.

Sworn to and subscribed before me this 25' April, 1878.

J. DEVONSHIRE,
U. S. Comm'r.

75 NEW HARBOR PROTECTION CO. vs. SHIP TORNADO, CARGO, FREIGHT. } No. 11207.

To save costs and unnecessary labor, it is agreed that the intervening claimants, the insurers of the cargo, in defending, be required to file only one answer setting up any matters of special defense, and that the allegations of this libel and interventions herein be held to be specially denied, except as may be admitted by their said answer, and strict proof required as if answers had been duly prepared and filed as to each libellant and intervenor.

(Sig.) M. M. COHEN, *Proctor for New Harbor P. Co.*
" FRED D. KING, *Proctor,*
" C. D. CRAIG, "
" H. E. UPTON, "
" COLTON & LEVY, "
" CHAS. S. RICE, "
" HUDSON & FEARN, "
" SINGLETON & BROWN, "
" B. EGAN, " *for several Intrs.*
" HORNOR & BENEDICT, "
" J. S. WHITAKER, "

76 (Sig.) P. P. CARROLL,
" RICHARD DE GRAY,
For crew of Norman and part Harry Wright and other Intervenors.

NEW ORLEANS, *Ap'l* 20, 1878.

Intervening exception and answer to underwriters to the libel of W. H. Ellis and others.—Filed May 1, 1878.

NEW HARBOR PROTECTION CO. vs. SHIP TORNADO, CARGO & FREIGHT. } 11207.

W. H. ELLIS, MASTER & OTHERS, vs. CARGO OF SHIP TORNADO. } 11229.

To the honorable E. C. Billings, judge of the district court of the United States for the district of Louisiana:

The intervening answer of—

1. The Atlantic Mutual Insurance Company of New York, a corporation created under the laws of New York, and domiciliated in the city of New York, and of which Jas. A. Whitlock is the special agent
77 in the city of New Orleans.

2. The British and Foreign Marine Insurance Company of Liverpool, a corporation created under the laws of Great Britain, and domiciliated in Liverpool, England, and of which Pim, Forwood & Co. are the agents in New Orleans.

3. The Standard Marine Insurance Company of Liverpool, England, a corporation created under the laws of Great Britain, and domiciliated in Liverpool, of which Geo. Mather is agent in New Orleans of the Indemnity Insurance Company of London, England.
4. The Factors and Traders' Insurance Co. of New Orleans, a corporation created under the laws of Louisiana, and domiciliated in New Orleans, and of which Edw'd A. Palfrey is president.
5. The New Orleans Insurance Association, a corporation created under the laws of the State of Louisiana, and domiciliated in New Orleans, and of which Wm. A. Bell is president pro tem.
6. The Insurance Company of North America, a corporation created
78 under the laws of Pennsylvania, and domiciliated in Philadelphia, of which Marshall J. Smith & Co. are agents in New Orleans.
7. The Phœnix Insurance Company of Brooklyn, a corporation created under the laws of the State of New York, and of which Marshall J. Smith & Co. are the agents in New Orleans.
8. The Rhenish Westphalian Lloyds Marine Insurance Co. of M. Gladbach, a corporation created under the laws of Germany, and domiciliated in Munchen Gladbach, Germany, and of which S. A. Moritz is agent in the city of New Orleans.

Intervening for their interests in the cargo and proceeds of cargo of the ship Tornado, to the libel of William H. Ellis, master, and Robert A. Stewart of London, and Jno. Stewart of St. Johns, New Brunswick, alleging themselves owners of the ship Tornado, said libel being filed in suit No. 11229, but by order of court consolidated to be tried
79 with said suit No. 11207, excepts, answers, and alleges as follows:

1. These respondents before answering except to the right of the said libellants to file said libel or make the demands therein contained in manner and form as attempted against the said cargo of cotton, or the proceeds of the said cargo of cotton, or any part thereof, because no claim has been filed by said libellants or either of them for freight as required by the rules of practice governing courts of admiralty in their procedure.

That the assertion of the ownership of the freight in the form of a claim verified by oath or affirmation in the usual manner, together with stipulation for costs, must precede the action for the recovery of freight out of the said cargo, or its proceeds in the registry of the court, especially as in this when the freight, if allowed, must contribute to salvage.

That it is not until after the claim is in, that the parties thus be-
80 coming claimants are to be heard for their interests, when the right asserted affects either the vessel or the freight or the cargo.

In the event of the foregoing exception being overruled, and only in that event, and without waiving the same, respondent answers and alleges as follows:

1st. That as to the matters and things contained in the 1st and 2d articles of said libel, having no personal knowledge (except as hereinafter stated), these respondents neither admit nor deny, but require strict proof, especially of the allegations of ownership of said vessel, and except as hereinafter admitted.

They admit that said ship was being loaded for a voyage from New Orleans to Liverpool, that the cargo was to have been 5,195 bales of cotton, that 164 bales thereof remained on the wharf, and also 23 bales never reached the levee at all, which had not yet been taken on board.

Further answering those portions of said articles as refer to the
81 incidents of said fire, the failure to extinguish it with gas, the sinking of the ship, the seizure by the marshal, &c., these respondents for brevity in pleading, and in order that the cotemporaneous facts may be presented, refer to the 4th, 5th, 6th, 7th, 8th, and 9th articles of the answer already prepared by them and filed herein, on the 25th day of April, 1878, and now make the allegations of the said articles in said answer part of this answer as if the same had been copied herein verbatim.

2d. That as to the matters and things contained in the 3d article of said libel, the same are for the most part untruly stated, and respondents require strict proof, except as may be hereinafter admitted.

Repondents admit that said master made application to bond said vessel and cargo, while the same were in the custody of the marshal, but they especially deny the truth of the assertion contained in said article
82 that the object of bonding was in order "that said cargo might after receiving such attention and handling in picking, drying, and rebaling so much thereof as might be necessary, and which libellants aver might easily have been done, have been sent to its destination, and freight thereon have been earned."

Respondents represent and charge the contrary of these averments to be true. They aver that the said cotton, with the exception of the 500 bales, and also 23 bales still in the marshal's hands, was so badly damaged by fire and water, and so liable to deterioration, injury, and decay, as to render a sale necessary without delay at this port, the port of injury and of loading, and that any other course would have resulted in the sacrifice of the interests of the shippers of the cotton. That no freight could have been earned by sending said cargo on to its destination as alleged, because freights were higher after the date of said fire of the Tornado, and
83 have so continued up to this date, i. e., higher than the rate at which the Tornado was to have been paid in the said shipment.

That the question of the damaged condition of the said cotton, and the immediate necessity for a sale thereof (except the 500 bales aforesaid), together with the question of the right of the captain to bond the same in order to earn freight thereon, together with other questions of like import raised by the libellants herein, have been already adjudicated by decree of this court rendered contradictorily between the captain of the Tornado, as the lawful bailee, and the salvors herein, and these respondents refer to said decree and opinion of this court then rendered as part hereof, and plead the same as determining said issues then and therein decided, and in bar of the libellants' claim herein.

Further answering that portion of said article, which attributes the failure of the captain to bond in part, to the opposition to these
84 respondents, they say that the record of the court shows that on the 28th February, 1878, an order of the court was granted on the application of the proctor for the principal salvor, the New Harbor Protection Company, directing the marshal to sell the cotton on the levee, as it came out of the ship, in such lots as may accumulate from day to day,

on two days' advertisement, the proceeds of said sales' to be held and deposited according to law.

That on the 1st March, 1878, a rule was taken by said captain, as lawful bailee, to rescind said order to sell, and for permission to bond, and your respondents or their agents were called upon the stand and examined as witnesses in behalf of the salvors to maintain the said order obtained by the said salvors to sell said cotton, and they gave it as their opinion that the order of sale which had been granted by the court should
85 not be disturbed if the interests of the owners of the cargo were to be consulted.

That the opinion of the court then rendered, and now again referred to as part hereof, shows that the cotton was decreed to be sold because it was perishable and liable to speedy deterioration, because no freight under the circumstances, by sacrificing the interests of the owners of the cargo and because the salvors' rights in the property saved, their jus in re, rendered the sale of all the property proper and necessary except the 500 bales then in press as aforesaid, which the captain was authorized to bond, but which 500 bales he never bonded, nor did he ever attempt to bond, the truth and fact being that the ship being destroyed by fire, for all sea-going purposes could not be repaired, having been formally condemned
86 on the 18' March, 1878, by a board of surveyors convened at the request of said Capt. W. H. Ellis, by the British consul, and was abandoned, as was her voyage, by orders given by her owners to the said captain, as your respondents are informed and charge.

3. That as to the matters contained in the 4th article of said libel your respondents are ignorant, but deny the truth of the same, and require strict proof in the premises.

These respondents, further answering, specially deny that the said cargo or its proceeds, or any portion thereof, can be made liable by lien or otherwise for the said demand. That by the usage and custom of trade the owners of said ship had to bear the said expenses, all of which were incident to loading their vessel, looking to the freight when earned for the reimbursement of such expenses; that by no possible contingency known to the law of commerce or mercantile usage could said libellants
87 rightfully recover both the demand they make for freight and the demand made for disbursements in said fourth article for the account of their agents, Schultz & Co., all the items of which are simply outfits and outlays preparatory to commencing to earn freight for $14,278.26 and the further sum of £198.7.2 railroad charges, and they believe and charge that said demand, in addition to the claim for freight, was made to annoy and harass your respondents by thus attempting to stop their funds in the registry of the court.

4. That as to the matters and things contained in the 5th & 6th articles of said libel these respondents deny the truth thereof, and require strict proof in the premises, and refers to the answer already made by them in article II herein as their answer to this article.

88 And now, further answering, defendants say that said libellants cannot recover their demands herein made, because the said alleged owners or said master did not at any time offer to repair the said ship or to make or enter upon the said voyage. The ship being formally condemned and abandoned, was sold by the master on 30' March, 1878, nor did they

or either of them make any effort or even offer to carry, as alleged, or to reship the said cargo or any part thereof in said ship Tornado or on any other vessel.

And, further answering, your respondents say that on the 19th of March, 1878, they filed their claim herein, to which reference is now made for brevity as part hereof.

That at that date the captain having allowed 18 days to pass without taking any steps to bond the 500 bales of cotton, the right to bond which had never been denied him, but on the contrary expressly granted
89 by the court, your respondents, on the day of , 1878, proceeded by rule against said Captain Ellis, as lawful bailee, to show cause why these respondents should not be permitted to bond said 500 bales, to which rule the said captain, though duly cited, made no defence whatever, and the same was made absolute, thus showing that the assertions in the libel that he, the said captain, wanted to bond in order to carry on or to reship said cargo, or any part thereof, to earn freight, was but a pretence.

5. And now further answering these respondents, refer to the 10th article in their answer, filed herein on the 25th day of April, 1878, for brevity as part of their answer herein, and now reiterate the same as if specially written herein, verbatim.

6th. And now, further answering, your respondents specially deny the allegation in said libel that said libellants or either of them were or still are (meaning thereby the date of the filing of the libel and since), the owners of the said ship Tornado, and they further deny that said
90 libellants had at the time of the filing of said libel, nor do they now possess or have any right, title, or interest whatever in the ownership of said ship Tornado, or in the claims and demands set forth in the said libel for freight or otherwise, because, as hereinbefore alleged, said ship Tornado, having been formally condemned by official survey, and formally abandoned by the said libellants as owners to the underwriters upon said ship, the effect of said abandonment, which was made on or about the 5th March, 1878, and prior to the filing of said libel, was to divest said libellants as owners of all title as from date of the loss, and to transfer to and invest in said abandoners or insurers the title to said ship as of the date of said loss, to wit, the 24th of February, 1878, and that said abandonment necessarily carried with it as an incident the divestiture of said libellants of all claim for freight, &c., set forth in the libel, if any existed, the existence of which, however, is not admitted, but expressly denied.

91 7th. And now, further answering, as well as by way of exception defendants say that said libellants cannot recover the demands in said libel contained represented as an account of their agents, Schultz & Co., amounting to $14,272.26, and the further sum of £198 7 2—

1. Because this hon. court, sitting as a court of admiralty, is absolutely without jurisdiction in the premises.

2. Because there is no admiralty lien for the payment thereof upon said cargo or its proceeds in the registry.

3. Because the said libellants, even if they have paid the same as ship owners (which is not admitted), have no lien or right of action of any nature against said cargo or its proceeds for reimbursement therefor, but must

look for reimbursement therefor entirely and exclusively to the freight when earned.

Their right to reimbursement therefore being dependent absolutely upon the contingency that freight will be earned, such being the risk or
92 adventure assumed by said ship owners in this case, as is common with all ship owners *in this case, as is common with all ship owners* according to the usage of trade under like circumstances, the rate of freight by commercial usage being always made sufficient in amount to cover such outlays and outfits so made at the owner's risk, and contingent upon the earning of freight as aforesaid.

Wherefore these intervening respondents and claimants pray that the libel of the said libellants, and the demands therein contained, may be rejected, and that this hon. court would pronounce against the libel of the said Wm. H. Ellis, master, and Robert A. Stewart and John Stewart, and condemn them in costs, and that said cargo of cotton and proceeds thereof be awarded to these respondents, as prayed for in their claim, and answer filed herein, and otherwise law and justice to administer in the premises.

(Signed) J. McCONNELL, *Proctor.*

93 The undersigned, being severally sworn, say that the facts and allegations contained in the foregoing answer are true to the best of their information, knowledge, and belief.

30' April, 1878.

FACTORS & TRADERS' INS. CO.,
ED. A. PALFREY, *Pres't.*
NEW ORLEANS INS. ASSOCIATION,
By G. LANAUX, *Sec'ry.*
GEO. MATHER, *Ag't,*
Standard Marine Ins. Co., Liverpool, & Liverpool Underwriters' Asso'c'n.
INSURANCE CO. OF NORTH AMERICA, OF PHLD.,
MARSHALL J. SMITH & CO., *Agents.*
PHŒNIX INS. CO., OF BROOKLYN,
MARSHAL J. SMITH & CO., *Agents.*
JAS. A. WHITLOCK,
Agent Rhenish & Westphalia Lloyd.
For the BRITISH & FOREIGN M. INS. CO., LIMITED,
p. p. PIM, FORWOOD & CO., *Agents.*
ARTHUR J. MITCHELL.
[SEAL.] J. G. EUSTIS,
U. S. Comm'r for Dist. of La.

94 *Decree of reference and dismissal of libel for freight, rendered* 18' *Feb'ry,* 1879.

NEW HARBOR PROTECTION CO. *vs.* SHIP TORNADO, CARGO, &C. } 11207.

W. H. ELLIS, MASTER, & AL., *vs.* CARGO OF SHIP TORNADO. } 11229.

This cause came on to be heard at the last term of the court, and was

argued by counsel. And thereupon, on consideration thereof, the court finds that this is a case of salvage of a low grade.

It is therefore ordered, adjudged, and decreed that the parties hereinafter named be allowed for their services, and paid from the fund in court, with costs of suit, as follows, to wit:

1. The tug Protector, the sum of $7,500

Out of this sum the owners of the tug will retain $2,404.57, for their expenses, & the balance of $5,095.43 will be divided between the owners and crew, as follows: ⅘s to the owners of the Protector, and ⅕ to the crew, to be distributed among said crew, according to pay-roll.

95

CONTRACT BOATS.

2. Tug Norman $800
3. " Harry Wright 1,000
4. " Rio Grande 1,000

One-half of the amounts allowed to said tugs Norman, Harry Wright, & Rio Grande is the share of the owners, the other half the share of the crews, to be distributed among said crews in manner above specified.

5. Tug Aspinwall $1,000
6. " Charley Wood 750
7. " Belle Darlington 500
8. " Continental 350
9. " N. M. Jones 350
10. " Ida 250
11. " Wasp 100
12. " Fearn 100
13. " Ella Wood, No. 2 250
14. " J. Cooper, jr 100
15. " Geo. Canby 500

and to be reimbursed all his expenses.

16. Tug B. D. Wood 450

& to be reimbursed all his expenses.

17. N. Theodore & Francis, 150 ea 300

& to be reimbursed all their expenses.

18. Drysdale & Son 150

and to be reimbursed all their expenses.

96

19. The laborers, with Rogers, Dower, Byrne, Larard, Weichman, Raynor, Kereney, I. Smith, and F. Laquary, each $10, in addition to what they have already been paid 100

20. Henry Ellerman 102 72
& damage against ship ..... 250 — 352 72

21. W. A. D. Anderson 318 30
22. Geo. Glidden 920 40
23. Thos. O'Connor & value of hose lost 250
24. J. Boyce, ass't to O'Connor 50
" M. Ray, " " " 50

25. Owners of engines, at the rate of from $10 to $15 per hour for time actually employed while raising ship, according to power and work done.
26. The firemen, $5 each per day for actual service rendered in raising ship.
27. Jas. Moore, for stopping holes below..... 50
28. Wm. Gleason hired to run engine, in order to raise the cotton out of the hold of the vessel..... 300

It is further ordered and decreed that the claim of the New Orleans Night Watchmen Co. be rejected, the same not being a maritime lien.

97 And it is referred to John Devonshire, commissioner, to prepare and submit a tableaux of distribution in accordance with the foregoing decree.

And it is further ordered, adjudged, and decreed that the libel for freight of Wm. H. Ellis, master, and others be, and the same is hereby, dismissed with costs.

FEBRUARY 19, 1879.

Order suspending the decree of dismissal of libel for freight.

11207. NEW HARB. PROT. CO. *vs.* SHIP TORNADO.
11229. W. H. ELLIS, MASTER, &C. " CARGO DO.

On motion of Thos. J. Semmes, esq., proctor for W. H. Ellis, master, & al., it is ordered by the court that the decree herein entered on 18th inst., dismissing the libel for freight, be suspended until the commissioner shall have filed his report and a final decree is rendered in the cause.

Rule to rescind order of consolidation.—Filed 26' March, 1879.

NEW HARBOR PROTECTION CO.
vs. } 11207.
SHIP TORNADO, CARGO, &C.

98 On motion of Thos. J. Semmes and R. DeGray, proctors for W. H. Ellis, master, and Robert H. Stewart and John Stewart, owners of the ship Tornado, it is ordered that James McConnell, proctor for owners of the cargo of said ship, and the proceeds of said cargo show cause on 28' inst. at 11 a. m. why the order by which the libel filed by said master and owners claiming freight and disbursements on said cargo and its proceeds in suit No. 11229 was consolidated with this suit should not be rescinded, and that said libel for freight and the answer thereto and such evidence taken in this cause as either party may be advised is material, shall be separately submitted to the court for adjudication as an independent case.

This rule was continued to 14th Ap'l, 1879.

Answer to rule to rescind consolidation.—Filed 14' *Ap'l*, 1879.

NEW HARB. PRO. CO. vs. SHIP TORNADO. } 11207.

99 W. H. ELLIS vs. CARGO TORNADO. } 11229.

Now into court comes the Atlantic Mutual Ins. Co. of New York, and others, claimants of the cargo and proceeds of the cargo of cotton herein, and for answer to the rule herein taken by W. H. Ellis, master, Rob't H. Stewart and Jno. Stewart, taken and filed on the 26th March, 1879, they oppose the same on the following grounds:

1. Because the said order of consolidation was properly granted after hearing argument of counsel, and cannot now be rescinded after the taking of the evidence and trial of said causes so consolidated without prejudice to the rights of the said claimants in the premises.

2. Because the application to rescind said order of consolidation comes too late at this date after judgment has been rendered, the movers in said rule having ample remedy by appeal in the premises.

APRIL 14, 1879.

Order setting aside order of consolidation, setting aside judgment of 18' *Feb'ry*, 1879, *dismissal for freight, & granting a new trial in the*
100 *cause of Ellis, master, & al., vs. ship Tornado, &c.*

NEW HARBOR PROTECTION CO. vs. SHIP TORNADO & CARGO. } 11207.

The rule to rescind the order of consolidation herein came up again for trial.

T. J. Semmes and R. DeGray, for W. H. Ellis & al., movers; J. McConnell for def'ts in rule.

And after hearing argument it is ordered by the court that the order made on 15 April, 1878, consolidating suit No. 11229 with suit 11207 be rescinded; that the judgment of the 18th February, 1879, dismissing the libel for freight of W. H. Ellis & al. be set aside and a new trial granted in the cause of said Ellis & al., *be set aside and a new trial granted in the cause of said Ellis & al.*, which will be treated as an independent case; and inasmuch as the evidence in suits 11207 & 11229 was taken contradictorily, each party is at liberty to offer such part of the
101 evidence as they may be advised or may deem necessary. Suit 11229 is assigned for trial on 22d inst, at 11 a. m.

Note of evidence.—April 29, 1879.

W. H. ELLIS & AL. vs. CARGO SHIP TORNADO. } 11229.

On the trial of this cause, the proctors submitting the question as to

what portions of the record 11207 should be offered in this cause, the court ruled that either party may offer any evidence and proceedings of record No. 11207 they may see fit.

Whereupon the proctors on both sides filed a list of their evidence.

Judgment dismissing libel for freight.—Entered April 29, 1879.

W. H. ELLIS, MASTER, & AL. vs. SHIP TORNADO, CARGO. } 11229.

102 This cause came on to be heard upon the pleadings and the evidence, and was argued by counsel; on consideration whereof it is ordered, adjudged, and decreed by the court that the libel be, and the same is hereby, dismissed at libellants' costs.

Judgment signed May 3, 1879.

EDWARD C. BILLINGS, *Judge.*

Application for appeal, May 2, 1879.

W. H. ELLIS, MASTER, & AL. vs. CARGO SHIP TORNADO. } 11229.

The proctors for libellants moving for a suspensive appeal in this cause it was ordered that the appeal bond be fixed contradictorily with the claimants' proctor on 8th inst.

MAY 8TH, 1879.

W. H. ELLIS & AL. vs. CARGO TORNADO. } 11229.

By consent of proctors the matter of fixing appeal bond is con-
103 tinued to 9th instant. Similar continuances were entered on 9, 10, 12, 16, 17, 19, until the 20 May, 1879, when the following order was entered:

TUESDAY, 20 *May*, 1879.

W. H. ELLIS & AL. vs. CARGO SHIP TORNADO. } 11229.

The motion herein made on the 2d May, 1879, for a suspensive appeal, and continued from time to time by consent of counsel, to fix the appeal bond, was this day called up,

When it is ordered that a suspensive appeal be allowed from the decree herein rendered on the 29th day of April, 1879, dismissing the libel in this cause, said appeal to be made returnable to the circuit court of the U. S. for the 5th circuit and district of Louisiana on the 1st Monday of November, 1879, the appellants giving bond in the sum of $500 with surety according to law.

Appeal bond.

UNITED STATES OF AMERICA,
District of Louisiana:

104 District court of the United States. In admiralty.

W. H. ELLIS & AL. *vs.* CARGO SHIP TORNADO. } No. 11229. Appeal bond.

Know all men by these presents that we, W. H. Ellis, master, and Robert N. Stewart and John Stewart as principals and Daniel Webster as surety, are held and firmly bound unto the Atlantic Mutual Ins. Co. of New York, The British Foreign Marine Ins. Co. of Liverpool, The Standard Marine Ins. Co. of Liverpool, The Factors & Traders' Ins. Co. of New Orleans, The New Orleans Ins. Association, The Ins. Co. of North America, The Phœnix Ins. Co. of Brooklyn, The Rhenish Westphalia Lloyds Marine Ins. Co. of M. Gladbach in the sum of five hundred dollars, to be paid to the said Atlantic Mutual Ins. Co. of New York and other claimants of the property seized herein, for the payment of which, well and truly to be made, in lawful money of the United States, we bind ourselves and each of us, our and each of our heirs, executors, and
105 administrators, jointly and severally, firmly by these presents. Sealed with our seal and dated at New Orleans the 27' day of May, 1879.

Whereas the above-named W. H. Ellis, Robert N. Steward, and Jno. Stewart have appealed to the next term of the circuit court of the *circuit court of the* United States for the 5th circuit and district of Louisiana from a final judgment of the district court of the United States for said district, rendered against them on the 29th day of April, 1879, and signed on the 3d day of May, 1879, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute their appeal to effect, and answer all damages and costs and satisfy whatever judgment may be rendered against them if they fail to make their appeal good, then this obligation to be void; otherwise the same shall be and remain in full force and effect.

W. H. ELLIS,
Per R. DE GRAY, *Proctor.* [L. S.]
ROBERT N. STEWART,
Per R. DE GRAY, *Proctor.* [L. S.]
106 JOHN STEWART,
Per R. DE GRAY, *Proctor.* [L. S.]
D. WEBSTER. [L. S.]

(Across the face:) Approved June 9, 1879.
EDWARD C. BILLINGS, *Judge.*

Bond filed June 9th, 1879.

K. LOEW,
Dy Clk.

PROCEEDINGS IN THE CIRCUIT COURT OF THE UNITED STATES.

Hearing and submission.—Extract from the minutes.—November term, 1879.

NEW ORLEANS, *Wednesday, January* 21, 1879.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, circuit judge.

W. H. ELLIS, MASTER, &C., *vs.* CARGO SHIP TORNADO. } No. 8859.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Louisiana, and having been argued by R. De Gray and T. J. Semmes for appellant and J. McConnell for appellees, the court took time to consider.

107 *Findings and decree dismissing libel.—Entered and filed March 8th*, 1880.

W. H. ELLIS ET AL. *vs.* CARGO OF THE SHIP TORNADO. } No. 8859. Admiralty appeal.

This cause came on to be heard upon the transcript of the pleadings, evidence, reports, exceptions, proceedings, and decrees in the district court and upon the written statements of E. M. Hudson, esq., filed on Jan'y 21, 1880, & Feb'y 20, 1880, and of T. J. Semmes, esq., filed Jan'y 21, 1880, which statements by agreement of parties were received as if they were the depositions of the persons making the same regularly taken, but subject to all legal objections as to competency and relevancy.

Whereupon the cause was argued by counsel, and the court, being advised in the premises, now finds the following facts:

1. On Sunday morning, February 24, 1878, the said ship Tornado was lying in the Mississippi River, moored to her wharf, in the
108 third district of the city of New Orleans, and bound on a voyage from New Orleans to Liverpool, England.

2. The libellant William H. Ellis was her master, and the libelants Robert A. Stewart and John Stewart were her owners.

3. On the morning of the said February 24, 1878, said ship, while so lying moored at the wharf and before she had broken ground for her said voyage, was discovered to be on fire in her hold.

4. At the time of the discovery of the fire her cargo consisted of 5,195 bales of cotton, of which 5,008 had been put on board the ship, and of the residue 164 bales were on the levee, and 23 bales had not yet reached the levee, for all which said cotton the master of said ship had given bills of lading for transportation of the same from said city of New Orleans to the city of Liverpool, England, with the exceptions usual and customary in the bills of lading.

5. Water was pumped into the ship to extinguish the fire, and
109 on Tuesday, Febr'y 26, 1878, near 6 o'clock p. m., being filled

with water, she sank to the bottom of the river alongside the wharf, a part of her bulwarks remaining above water.

6. While so resting upon the bottom of the river, the ship, cargo, and freight were on Wednesday, February 27, 1878, libelled in the U. S. district court for the district of Louisiana for salvage by the New Harbor Protection Company, and about 2 o'clock p. m. of that day the United States marshal for the district of Louisiana, by virtue of a warrant of seizure issued by said court on said libel for salvage, took possession of the ship and cargo.

7. On Thursday, February 28, 1878, and about noon of that day the ship was pumped out and raised alongside the wharf, and the discharge of that part of the cargo on board commenced, all of said cotton on board being damaged by water, and some of it by fire, 326 bales having been removed by the salvors in an undamaged condition before she
110 sank but after the fire was discovered, but salvage was claimed and allowed on the entire cargo.

8. On the same day, Febr'y 28, 1878, M. M. Cohen, esq., proctor for the salvors, who had libelled the ship and cargo, filed in the district court a motion in writing suggesting that the whole cargo now (then) being discharged from the ship Tornado is (was) greatly damaged by water and some of it by fire and water, and will (would) in all probability have ultimately to be sold, being in unfit condition to be sent to destination, and an order of said court was thereupon rendered on said motion directing the sale of the cargo to be made by the marshal upon the levee as it came out of the ship, on two days' advertisement, in such lots as might accumulate from day to day.

9. On the same day, February 28, 1878, an application was made by the present libellant, Wm. H. Ellis, the master of the ship, in which he represented that he was desirous and entitled to bond said ship and cargo, and asked for a rule upon the libellant to show cause on the next
111 day, March 1st, why said order to sell said cargo should not be rescinded, and the claimant, said master, be allowed to bond said cargo.

10. On March 1st said rule came on for hearing before said court, Mr. M. M. Cohen, proctor for the salvors, who had libelled the ship, freight, and cargo, and Mr. James McConnell, representing the insurers of the cargo, appeared and resisted the rescinding of the order of sale, and Mr. T. J. Semmes and Mr. Grover and Harding appeared for the said master and claimants and the mover of the rule. On the trial of the rule witnesses were examined orally before the judge, among them various representatives of the underwriters on the cargo, who were called to the stand as witnesses by Mr. Cohen, proctor for the salvors, and who testified that if their interest were to be consulted they preferred that said cotton should be sold by the marshal as it came out of the ship, and that said master should not be permitted to bond said cotton.

Mr. McConnell then asked leave to be heard as counsel in behalf of the underwriters on the cargo. To this Mr. Semmes, counsel for
112 the said master and claimant, objected, and insisted that counsel for the underwriters on cargo could not be heard until after the proof of abandonment to them by the owners of the cargo and acceptance by them of the abandonment. And thereupon Mr. Palfrey, president of

the Factors' and Traders' Insurance Company of New Orleans, which was one of the companies represented by Mr. McConnell, and one of the witnesses who had been called to the stand as above stated, was recalled to the stand by Mr. McConnell, and testified that so far as his said company was concerned the loss on said cargo had been paid or ordered to be paid, and said company had become the owner of the cotton insured by it; that abandonment thereof had been made and accepted by his said company. After this Mr. McConnell was allowed to and did make an oral argument in behalf of the underwriters in opposition to the motion to rescind the order to sell which had been obtained by the salvors, but no pleadings were filed in behalf of said underwriters.

Upon the trial of said rule evidence was also taken by order of
113 the court in relation to the condition of said cargo, and whether the same was or was not a total loss.

11. On March 5, 1878, and before the district court had made any decision or order on said rule to rescind the order for the sale of said cotton, E. M. Hudson, esq., as proctor representing the underwriters at Lloyds, by leave of the said court filed an intervention for the interest of the insurers of the freight on said cargo, in which it was prayed that the said order for the sale of said cargo be rescinded. Said intervention was supported by affidavits filed by intervenors and by a brief of the proctor, Mr. Hudson.

12. Afterwards, to wit, on March 6th, 1878, after consideration of said rule taken by the master of the ship to rescind said order of sale, and the evidence and arguments thereon, and of the said intervention mentioned in the preceding paragraph, and said affidavits and brief submitted therewith, the court ordered that the said master and claimant, Wm. H.
114 Ellis, be allowed to bond the ship and such of the cotton as was then stored in the lower levee steam cotton-press, which was in good order, amounting to 523 bales, and that the remainder of the cargo upon board the ship or upon the levee, which was more or less damaged, be sold by the marshal after three days' notice, and all questions of freight were reserved by the court, and the court appointed W. C. Black, esq., a trinity master, to advise and assist in making sale of the cotton.

13. That on the 19th day of March, 1878, the underwriters filed their claim, claiming all of said cargo, and procured an order from the judge of the district court to be entered on said claim, suspending the right given to said W. H. Ellis, master as aforesaid, on the 6th of March, 1878, to bond such of the cotton as was stored in levee cotton-press aforesaid, to wit, about 500 bales, until the further order of the court.

14. Afterwards, on March 26, 1878, the said master and claimant not having bonded said cotton, which by the order mentioned in the
115 foregoing paragraph he was allowed to bond, a rule was taken and duly served on him to show cause why said order, so far as it allowed him to bond a portion of said cotton, should not be rescinded and the movers of the rule, the insurers of said cargo, allowed to bond the same. Said rule was heard on the next day, March 27th, by the district court, the movers of the rule and the said master and claimant, Wm. H. Ellis, being represented by their respective counsel, and was by the court made absolute without opposition, and the order allowing said mas-

ter and claimant to bond said portion of said cargo was rescinded and movers of the rule allowed to bond the same.

15. Libellants paid for the compressing of said cargo before it was put on board said vessel, and for stowing the same on board, and other expenses incident thereto, the sum of $14,278.26.

The gross freight on said cargo, had it been delivered at its destination in Liverpool, as required by bills of lading, would have been £4,169 13*s.* and 1*d.*

116 That 523 bales of the cargo of said cotton, of which 23 arrived alongside of her in the forenoon of the day on which said fire was discovered, and 164 of which was on the levee or wharf alongside of the ship, ready to be put on board, when said fire was discovered, and of which 326 had been removed from said ship by the sailors after said fire was discovered and before said ship sank, were in an undamaged and sound condition.

16. That in consequence of said fire on said ship Tornado, and as a result thereof, said ship was so badly damaged that the cost of her repairs would exceed her value when repaired; that she was unseaworthy, and incapable of earning freight.

17. That the 523 bales of cotton, part of said cargo, which were undamaged, and were bonded by the underwriters, were appraised at the sum of $19,100, and the gross proceeds of the sale of the damaged cotton, part of said cargo, amounting to $116,000.

18. That 1,185 bales of the damaged cotton, part of said cargo,
117 were shipped by the purchaser at the marshal's sale coastwise, and to Philadelphia and other cities of the northern States, in the condition it came from the ship; that 2,896 bales of said damaged cotton were sent to the pickeries, picked, dried, and rebaled, and shipped; 2,446 of said bales to Liverpool, and 450 to Philadelphia; that all the damaged cotton taken from said ship were unmerchantable cotton even after it had been picked, dried, and rebaled—that is, it could not be used for making cotton cloth, but could only be used for making felt hats, paper, wadding, and such like articles, having lost by the submersion and drying a large part of its natural oil, its fibre being injured and its weight reduced.

And, as a conclusion of law, from the facts aforesaid, the court is of opinion and finds:

1. That the libellants have no lien for freight on said cargo of cotton, or the proceeds thereof in the registry of the court, or for the said
118 sum of money advanced and paid by them for compressing and storing said cargo.

2. That the libel in this cause should be dismissed at libellants' costs.

It is therefore ordered, adjudged, and decreed that said libel be dismissed at the costs of the libellants.

March 8, 1880.

(Signed) W. B. WOODS,
Circuit Judge.

Motion for and order allowing appeal.—Entered & filed March 8, 1880.

U. S. circuit court, dist. of Louisiana.

W. H. ELLIS ET AL.
vs.
CARGO OF SHIP TORNADO. } No. 8859.

On motion of T. J. Semmes and Richard De Gray, proctor for libellants, and on suggesting to the court that there is error in the final decree entered herein dismissing their libel, and that they are aggrieved thereby and desire to appeal therefrom—

It is ordered that libellants be allowed an appeal from said final
119 judgment and decree returnable to the next term of the Supreme Court of the United States, upon giving bond in the sum of five hundred dollars conditioned according to law, and with sureties to be approved by a judge of this court.

March 8, 1880.

(Signed)

W. B. WOODS, *Judge.*

Appeal bond.—Filed March 16th, 1880.

UNITED STATES OF AMERICA:

Know all men by these presents that we, William H. Ellis, Robert A. Stewart and John Stewart, principals, and Joseph Hernandez as surety, are held and firmly bound, jointly and severally, unto The Atlantic Mutual Insurance Co. of New York, The British and Foreign Marine Insurance Co. of Liverpool, England, The Standard Marine Insurance Co. of Liverpool England, The Factors' and Traders' Insurance Company of New Orleans, Louisiana, The New Orleans Insurance Association of New Orleans, Louisiana, The Insurance Co. of North America, of Philadelphia, Penn., The Phœnix Insurance Co. of Brooklyn, New
120 New York, The Rhenish Westphalian Lloyds Marine Insurance Company of M. Gladbach, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Atlantic Mutual Insurance Co. of New York, The British and Foreign Marine Insurance Company of Liverpool, England, The Standard Marine Insurance Company of Liverpool, England, The Factors' and Traders' Insurance Company of New Orleans, Louisiana, The New Orleans Insurance Association of New Orleans, Louisiana, The Insurance Company of North America, of Philadelphia, Pennsylvania. The Phœnix Insurance Company of Brooklyn, New York, The Rhenish Westphalian Lloyds Marine Insurance Company of M. Gladbach, their heirs, executors, administrators, and assigns, for which payment well and truly to be made we bind ourselves and each of us, by himself and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 13th day of March, in
121 the year of our Lord eighteen hundred and eighty.

Whereas the said W. H. Ellis, R. A. Stewart, and John Stewart

having heretofore, to wit, on the 8th day of March, 1880, taken an appeal to the Supreme Court of the United States in the suit of William H. Ellis, master, and Robert A. Stewart and John Stewart vs. The Cargo of the Ship Tornado, No. 11229 of the docket thereof.

Now, the condition of the above obligation is that if the above bounden W. H. Lewis, master, Robert A. Stewart, and John Stewart shall prosecute their said appeal to effect, and shall answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) WILLIAM H. ELLIS. [L. S.]
Do. ROBERT A. STEWART &
JOHN STEWART,
By Their Attorney.
THOS. J. SEMMES. [L. S.]
122 (Signed) J. HERNANDEZ. [SEAL.]

(Across the face:)
Approved.
(Signed) EDWARD C. BILLINGS, *Judge.*

Approved.
(Signed) W. B. WOODS, *Judge.*

UNITED STATES OF AMERICA,
District of Louisiana, ss:

Personally appeared Joseph Hernandez, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in New Orleans, Louisiana, and is worth the full sum of one thousand dollars over and above all of his debts and liabilities, and property exempt from execution.

(Signed) J. HERNANDEZ.

Subscribed and sworn before me this 13' day of March, 1880.
(Signed) JAS. FAHEY,
Not. Pub.

123 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 122 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of William H. Ellis, master, et al. vs. Cargo Ship Tornado, No. 8859 of the docket of said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 30th day of June, A. D. 1880.

(Nineteen words erased approved.)
[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, W. B. Woods, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 30th day of June, A. D. 1880.

W. B. WOODS.

124 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to The Atlantic Mutual Insurance Company of New York, The British & Foreign Marine Insurance Company of Liverpool, England, The Standard Marine Insurance Company of Liverpool, England, The Factors and Traders' Insurance Company of New Orleans, Louisiana, the New Orleans Insurance Association of New Orleans, Louisiana, The Insurance Company of North America, of Philadelphia, Pennsylvania, The Phœnix Insurance Company of Brooklyn, New York, The Rhenish Westphalian Lloyds Marine Insurance Company of M. Gladbach, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a motion and order for an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein William H. Ellis, master, Robert A. Stewart, and John Stewart are libellants and appellants, and you, and each of you, are claimants and appellees, to show cause, if any there be, why the decree rendered against the said William H. Ellis, master, Robert A. Stewart, and John Stewart, as in said motion and order for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of April, in the year of our Lord one thousand eight hundred and eighty.

W. B. WOODS, *Judge.*

(Indorsed:) United States circuit court. No. 8859. W. H. Ellis et al. vs. Cargo of Ship Tornado. Citation. Marshal's return. Received Apr. 9, 1880, by the U. S. marshal, and see return inside.

Received Apr. 9th, 1880, by the U. S. marshal, and on April 10th, 1880, I served a true copy of the within citation of appeal on the appellees herein named, to wit, The Atlantic Mutual Insurance Company of New York, The British and Foreign Marine Insurance Company of Liverpool, England, The Standard Marine Insurance Company of Liverpool, England, The Factors and Traders' Insurance Company of New Orleans Louisiana, The New Orleans Association of New Orleans, Louisiana, The Insurance Company of North America, of Philadelphia, Pennsylva-

nia, The Phœnix Insurance Company of Brooklyn, New York, The Rheinish Westphalian Lloyds Marine Insurance Company of M. Gladbach, by delivering the same to James McConnell, esq., the attorney for the aforesaid companies, in person, in the city of New Orleans, district of Louisiana.

E. S. CURRY,
D'y U. S. Marshal for District of Louisiana.

125 Personally appeared before me, E. S. Curry, a deputy United States marshal for the district of Louisiana, and makes oath that he served a true copy of the within citation of appeal on the appellees herein named as set forth in his official return hereon.

E. S. CURRY,
D'y U. S. Marshal, District of Louisiana.

Sworn to and subscribed before me this 13th day of April, 1880.

T. V. COUPLAND,
D'y Clerk.

(Indorsement on cover:) No. 237. William H. Ellis, master, and Robert A. Stewart and John Stewart, owners of the ship Tornado, appellants, vs. The Atlantic Mutual Insurance Company, of New York, The British & Foreign Marine Insurance Company of Liverpool, England, et al. Louisiana C. C. U. S. Filed 6th July, 1880.

106-342

FILED
APR 21 1883
JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES.

No. 237.

WILLIAM H. ELLIS AND AL.

VERSUS

THE ATLANTIC MUTUAL INSURANCE COMPANY AND AL.

October Term, 1882.

STATEMENT OF THE CASE.

THOS. J. SEMMES,
RICH'D DEGRAY,
Proctors for Appellants.

A. W. Hyatt, Print, 73 Camp St. N. O.—21,745

SUPREME COURT OF THE UNITED STATES.

No. 237.

WILLIAM H. ELLIS AND AL.

versus

THE ATLANTIC MUTUAL INSURANCE COMPANY AND AL.

October Term, 1882.

STATEMENT OF THE CASE.

On Sunday morning the 24th February, 1878, the ship Tornado was lying at the wharf in the city of New Orleans, bound on a voyage to Liverpool, England. Her cargo consisted of 5195 bales of cotton; 5008 of which had been received on board and stowed; 164 bales were on the wharf, and 23 bales had not yet reached the levee, but which did arrive alongside the ship in the forenoon of the day, for all of which the master had given bills of lading for transportation to Liverpool, with the exceptions usual and customary in bills of lading.

In this condition of things, the ship was discovered to be on fire in her hold; thereupon water was pumped in to extinguish the fire; on Tuesday the 26th of February, in the evening, the ship being filled with water, sank alongside the wharf to the bottom of the river, a part of her bulwarks remaining above water, but before she sank, 326 bales of cotton were removed from her hold in an undamaged condition.

While thus resting on the bottom of the river, on 27th February, 1878, ship, cargo and freight were libelled for salvage.

On the following day, about noon, the ship was pumped out and raised alongside the wharf, and the discharge of her cargo commenced.

On the same day, 28th February, 1878, on an ex parte motion of the proctor for the salvors (who claimed and were allowed salvage on the entire cargo), and on a mere suggestion that the cargo then being discharged, was greatly damaged by water, and some of it by fire and water, and would in all probability have to be sold, an order was entered directing the marshal to sell the cargo as it came out of the ship, on two days' advertisement, in such lots as might accumulate from day to day.

On the same day, 28 h February, the appellant, Ellis, master of the ship, representing that he was desirous and entitled to bond the ship and cargo, and that the order for sale would work great injury to him, asked for a rule on the libellant salvor to show cause on the next day, 1st March, why the order to sell said cargo should not be rescinded, and he be allowed to bond the same.

On the trial of the rule on 1st March, the proctor for the salvors, and a proctor representing the interests of the insurers of the cargo, appeared and resisted the rescinding of the order of sale; in the course of said trial witnesses were heard orally by the judge, among them various representatives of the underwriters on the cargo, who were called to the stand by the proctor for the salvors, who testified that if their interest were to be consulted, they preferred that said cotton should be sold by the marshal as it came out of the ship, and that the master should not be permitted to bond said cotton.

The proctor for the underwriters on cargo then asked leave to be heard as counsel on their behalf; to this the proctors for the master objected, and insisted that the underwriters on cargo could not be heard until after proof of abandonment to them by the owners of the cargo, and the acceptance of such abandonment. Thereupon, the president of one of the companies insurers on cargo, represented by the proctor for all of them, who had been examined as a witness, as before stated, was recalled to the stand, and testified that so far as his company was concerned, the loss on said cargo had been paid or ordered to be

paid, and said company had become the owner of the cotton insured by it; that abandonment thereof had been made and accepted.

After this the proctor, representing all the underwriters on cargo, made an argument in their behalf, in opposition to the motion to rescind the order to sell, which had been obtained by the salvors.

On the trial of the rule aforesaid, evidence was taken by order of the court in relation to the condition of said cargo, and whether the same was or was not a total loss.

On 5th March, 1878, and before any decision on said rule to rescind the order for sale of cargo, a proctor representing the underwriters at Lloyds, by leave of the court, filed an intervention for the interest of the insurers on the freight of said cargo, asking that the order for the sale of the cargo be rescinded; this intervention was supported by affidavits and a brief.

On 6th March, 1878, the court decided to allow the master to bond the ship and 523 bales of cotton then stored at a cotton press, in good order, but directed "that the remainder of the "cargo on board the ship or on the levee, which *was more or less* "*damaged*, be sold by the marshal after three days' notice, *and* "*all questions of freight were reserved by the court.*"

On 19th March, the underwriters on cargo filed their claim, claiming all of said cargo as abandonees thereof, alleging a constructive total loss of ship and cargo which, in their opinion, terminated the voyage, and, therefore, the master had no right or authority to bond the cargo. See their claim pp 17–18. On the same day they procured from the court an order to suspend the master's right to bond the 523 bales of cotton above mentioned.

On 26th March, 1878, a rule was taken by the said underwriters on cargo, to rescind the order allowing the master to bond said 523 bales of cotton, and of which, on 19th March, they had procured the suspension.

The rule was heard next day, both parties being represented by counsel, and was, by the court, made absolute without oppo-

sition; and the order allowing the master to bond said 523 bales of cotton was rescinded, and the underwriters were allowed to bond the same.

On 30th March, 1878, the master and owners of the ship filed their libel against the cargo and its proceeds, setting forth the right of the master to bond the cargo, his application to bond, that, after proper care in handling, picking, drying and rebaling, the cargo might have been sent to its destination and freight earned; that his efforts to get possession of the cargo were defeated by the opposition of the insurers, who became owners by abandonment; that $14,278 26 had been expended by the ship in compressing and stowing cargo, and other expenses incidental thereto; and that the freight money agreed on for carrying said cargo was £4,169 13s. 1d.

The Circuit Court finds that the amount of expenses of loading, and the amount of freight agreed on, as stated in this libel, are correct.

On 15th April, 1878, this libel for freight and expenses was, on application of the underwriters on cargo, consolidated with the suit for salvage, p. 10.

The cases having been argued together, a decree was entered in the District Court on 18th February, 1879, dismissing the libel for freight and disbursements; but its operation was suspended by an order to that effect entered on the same day, pp. 32,33.

On 14th April, 1879, the order of consolidation was set aside, and a new trial granted, p. 34.

On 29th April, 1879, the case was again submitted to the court as an independent case, and the libel was again dismissed.

The Circuit Court, in addition to the foregoing facts, also found the following:

1. That the ship, in consequence of the fire, was so badly damaged that the cost of repairs would exceed her value when repaired; that she was unseaworthy and incapable of earning freight.

2. That the aforesaid 523 bales of undamaged cotton were appraised at $19,100, and the gross proceeds of the sales of the damaged cotton amounted to $116,000.

3. That 1185 bales of the damaged cotton were shipped by the purchasers at the Marshal's sale, coastwise to Philadelphia and other cities in the Northern States, in the condition it came from the ship; and that 2896 bales of said damaged cotton were sent to pickery, dried and rebaled and shipped by the purchasers, 2,446 of said bales to Liverpool, and 450 to Philadelphia; that all of the bales of damaged cotton, even after it had been picked, dried and rebaled, were *unmerchantable, that is, could not be used for making cotton cloth, but could only be used for making felt hats, paper, wadding, and such like articles, having lost, by submersion and drying, a large part of its natural oil, its fibre being injured and its weight reduced.*

The conclusion of law deduced by the Circuit Court is, that the master and owners of the ship have no lien for freight on said cargo of cotton, or the proceeds thereof, in the registry of the court, or for the said sum of money advanced and paid by them for compressing and storing said cargo, and hence that court affirmed the decree of the District Court dismissing the libel.

It is this conclusion of law which we consider erroneous.

ASSIGNMENT OF ERRORS.

1. There was error in the finding of the Circuit Court, that libellants had no lien on said cargo and proceeds for freight.

2. There was error in the finding of the Circuit Court, that libellants had no lien on said cargo and proceeds for the amount of money advanced and paid, as aforesaid, for the purpose of earning freight.

3. That the Circuit Court erred in rendering a decree dismissing said libel, because libellants, whether entitled to a lien or not, were, under the circumstances, entitled to be repaid by the underwriters, on cargo, the sum of money aforesaid, paid for

compressing and stowing said cotton, and other expenses incident to shipment.

ARGUMENT.

It is well settled that if a disaster occurs by which the vessel is disabled at an intermediate port, the *whole* freight is payable, if by the *default* of the owner of the cargo, the master is prevented from forwarding the cargo from the intermediate port to its destination, while no freight is payable if the owner of the cargo, against his will, is compelled to take the cargo at an intermediate port.

It is equally well settled that the abandonment of the ship by the master at such intermediate port, while the cargo is under arrest, in a salvage suit, is not a repudiation by him of his contract to forward the cargo, for there remains the other alternative of transshipping the goods, or forwarding them in another vessel.

It is equally well settled that it is no part of the duty of the master, after the owners of the cargo are apprised of the circumstances, to procure the release of the cargo from arrest. "This " was for the owners of the cargo to do for themselves, and, upon " their doing it, the obligation would have been renewed upon " the master to forward the cargo to its destination, under the " pain of forfeiting the freight."

The Soblomsten, L. R., 1 Ad. and Ecclesiastical, p. 297.

When the cargo is under arrest for salvage, the act of the court in selling it is the act of the cargo owner.

The Cito, 7 Prob. Div. 6

Cargo ex Galam, Br. and Lush, 167.

It is plain, from the findings of the court in this case, that the act of the court in refusing to deliver the cargo to the master was, in fact, as well as in law, the act of the owners of the cargo; for I treat the underwriters as owners, by virtue of the abandonment of the cargo made to them, and by them accepted.

It is to be observed, also, that in this case there was no

abandonment of the ship and although the court finds that in consequence of the fire the ship was so badly damaged that the cost of her repairs would exceed her value when repaired, and that in her then condition she was unseaworthy, and incapable of earning freight, the master had a right to repair, even though the cost of repairs would exceed her value when repaired.

Aitchison vs. Lohre, 4 App. Cas. 762.

It is only when the ship is abandoned at sea as derelict, as in the case of the Kathleen, L. R. 4 A. and E. 269, that the cargo owners have a right to treat the voyage as broken up; but even in case of derelict, it was held in the case of the Cito, that if the ship owners had applied *first* to bond before the cargo owners had elected to treat the voyage broken up, the election of the cargo owners would be defeated.

The Cito 7 Prob. Div. p. 6.

In the case just quoted, it was urged that the abandonment of the ship at sea put an end to the contract of affreightment; but Brett, L. J., said: "I am not prepared to say it does. Sup-"pose a wrongful abandonment, without its being occasioned by "the perils of the sea, it is clear that in that case the owner of "the cargo might sue the ship owner for his breach of contract; "so it cannot be said that it puts an end to the contract of "affreightment. It is sufficient, I think, for the determination "of the present case to say, that by an abandonment of the ship, "without any intention to retake possession of it, the ship "owner has, so far as he can, abandoned the contract, so as to "allow the other party to it, the cargo owner, to treat it as "abandoned. Whilst the vessel was in that position, so that "her owners could not enforce the contract of affreightment "against the cargo owners, the latter went to the Court of "Admiralty, and claimed to have the cargo released and given "to them without payment of freight, upon their giving bail to "the salvors; and thus the cargo owners thereby sought to "exercise their right to treat the contract at an end. The ship "owners, however, by a counter motion to the court, endeavored

"to prevent the cargo owners from exercising this right, and "asked to have the cargo delivered to them (they being ready "to give bail for the same), in order that they might carry it to "the port of destination and so earn freight. Now, it seems to "me that the Court of Admiralty would have been wrong if it "had deprived the cargo owners of their right *to treat what the "ship owners had done* as an abandonment of the contract of "affreightment, and therefore that the order which the court "made was a right one. We do not decide what would have "been the result if *after the ship had been brought in by the salvors, "as it was, and before the owners of cargo had come in and exercised "their right to the cargo, the ship owners had given bail for the ship "and cargo, and had carried the cargo on.*"

The case of the Kathleen, L. R. 4, A. and E. 277, was that of a derelict vessel, abandoned at sea, on a voyage from Charleston to Bremen, and brought into Dover by salvors. Three days after she was brought in, the court ordered the delivery of the cargo, consisting of cotton. Ten days afterwards, on affidavit of deterioration by owners of the cargo, a sale was ordered. *After the vessel was unloaded*, and after the order of sale, at the instance of the cargo owners, the ship owners offered to carry the cargo on to Bremen. The sale was made reserving all questions of freight.

The Court says: "Whatever right the ship owner had, has "been preserved to him, for, as Mr. Justice Story said, in the "case of the Nathaniel Hooper, 3 Sumner, 542, the possession of "the property by the court through its officers, is a possession "protective of all concerned, and not displacing the rights or "lien of any party."

The court held that the abandonment of the vessel at sea, by which she became derelict, put an end to the contract of affreightment. The ground of the opinion is the distinction drawn by Sir John Nicol, in the case of the Dantzic Packet, between salvage rendered to a ship in distress, and to a ship abandoned.

"It is different, he says, in the case of a derelict, there the "first occupant has a vested interest, and a right of exclusive "possession, if alone he can save the property—he takes posses- "sion, indeed, for the benefit of the crown in the first instance, "but subject to a liberal remuneration."

The court proceeds thus: "In fact, the possession of the "cargo abandoned by the ship owner, vested first in the salvors, "and afterwards in this Court, before it could be restored to the "owners."

The judgment in this case may be sustained on the grounds mentioned in the Cito, to-wit: that the cargo owners, by applying to the court, *first* for *the sale of the cargo*, elected to treat the contract of affreightment at an end, which they had a right to do in case of derelict, so long as the ship owner, by no act of his, had manifested an intention to resume possession of the cargo. Both of these cases, as I have said, are cases of derelict, and the principles on which they are founded have no application to a vessel in distress, or damaged in port.

Where a disaster occurs at the port of loading, and the ship is scuttled to extinguish fire on board, the contract of affreightment is not thereby terminated.

This was held in Jones vs. Holm, L. R. 2 Exch. 334. The defendant chartered a vessel then at Liverpool to proceed to Pernambuco, and there load a full cargo of cotton and sugar. The vessel having arrived at Pernambuco, took on board 2380 bags of sugar, and 700 bales of cotton, and 118 bales were alongside in lighters for loading when a fire broke out on board, and the vessel was scuttled. The master had, at that time, signed and delivered to the charterer bills of lading for the cargo shipped and alongside, but that did not amount to a *full* cargo. The cargo on board was damaged, and sold by the master, who forwarded the cargo alongside by another vessel. The ship was raised, repaired in two months, and tendered to defendants' agents, who refused to load any further cargo; it was held that

defendant was not exonerated from his obligation to load a full and complete cargo.

In that case it was urged that the original voyage was frustrated, and that the forwarding of the remaining bales by another vessel evinced an intention to treat the charter party as at an end; but the court held that the circumstances under which the delay, caused by the accident, occurred, did not make the voyage a different voyage, nor did the forwarding of part of the cargo, at a higher rate of freight than that specified in the charter party, manifest an intention to terminate it.

In the case of Cargo ex Galam, 1 Brown and Lush., 178, it was determined by the privy council that the master is entitled to his full freight if he has been prevented from carrying the cargo to its destination by the act or default of the owner; and that when the orders of a court of Admiralty are occasioned by the act or default of the owners of the cargo, and such orders render it impossible to carry on the cargo, the ship owner stands in the situation of a party who has been prevented, by the default of the owner of the cargo, from completing the voyage.

It is urged, however, that in the case at bar the disaster occurred at the port of outfit, and before the ship broke ground, and therefore before she commenced to earn freight. But the cargo was on board, in possession of the ship, and bills of lading had been signed and delivered by the master before the fire occurred.

It is well settled that in the absence of mutual consent to the dissolution of the contract, a merchant cannot insist on having his goods relanded, and delivered to him at the port of outfit, without paying the freight that might become due for the carriage of the goods, for although the voyage is not commenced, the cargo remains, and the master may insist on performing it with a view to freight.

Lord Tonterden, in his treatise on shipping, p. 595, states the law as follows: "A merchant who has laden goods cannot insist on having them relanded and delivered to him without

"paying the freight that might become due for the carriage of "them, and indemnifying the master against the consequences "of any bill of lading signed by him." In Tindal vs. Taylor, 4 Ellis & B. 219, the Court of Queen's Bench cite the above passage with commendation, and Lord Campbell says: "It is ar- "gued that there can be no lien on the goods for freight not "yet earned or due; but when the goods were laden, to be car- "ried on a particular voyage, there was a cantract that the mas- "ter should carry them in the ship upon that voyage for freight: "and the general rule is that a contract once made cannot be "dissolved except with the consent of both the contracting par- "ties. By the usage of trade, the merchant, if he redemands the "goods in a reasonable time before the ship sails, is entitled to "have them delivered back to him on paying the freight that "might become due for the carriage of them, and on indemnify- "ing the master against the consequences of any bills of lading "signed for them; but these are conditions to be performed be- "fore the original contract can be affected by the demand of the "goods. It would be most unjust to the owners and master of "the ship if we were to hold that upon a simple demand, at any "time, the goods must be delivered back in the port of outfit."

Parsons in his work on Maratime law states the law thus, vol. 1, pp. 158-9: "As the ship owner has no claim for freight "until the whole voyage is completed, he has no lien on the cargo "for payment of freight until then, but in the meantime he has "a lien on the cargo for the earning of freight. That is, he has a "right to hold a cargo once shipped on board his vessel, and to "carry it to its destination, although circumstances may occur "which will cause great delay, and, perhaps, great diminution "of value. It would seem from the cases, that the shipper may "at any time reclaim his goods by paying full freight, especially "if he adds compensation for damage, trouble, etc.; for the lien "or hold of the shipowner upon them is only for this purpose; "but unless he chose to do this, the ship owner need not deliver "them, although he is in port damaged, and the cargo damaged

" and needing repair, which, with the necessary care of the " cargo, cost much time and money."

" Neither party is at liberty to abandon the contract," says Mr. Justice Putnam, in Clark vs. Ins. Co., 2 Pick. 104, " without " the consent of the other, or without legal cause, which was not " procured or occasioned by the fault of the other."

Lord Chancellor Kent, in Palmer vs. Lorillard, 16 Johns. 348, says: " It is well understood in the English law, and in our own, " that it is not in the power of one only of the parties to rescind " a contract. Being mutually binding, it requires mutual consent " to dissolve it. The one party had no right to tender the cargo, " nor the other to demand it, until the contract had been ful- " filled, unless, indeed, the demand was accompanied with the " offer of the entire freight. The one side had an interest in the " conveyance of the goods, and the other in the payment of the " freight, and the obligation to perform in the time and mode " was reciprocal."

In Bartlett vs. Carnley, 6 Duer. 195, in action brought by the master of the vessel against the sheriff, for seizing goods laden on board, the court held the plaintiff entitled to recover by way of damages, full freight.

In Campbell vs. Conner, 70 New York, 70, the court says: " It is well settled at common law, that a shipper cannot insist " upon having his goods unloaded and delivered to him at the " port of out-fit, without paying the freight and indemnifying " the master against the consequences of any bill of lading " signed by him."

In Parsons on Admiralty and Shipping, Vol. 1, p. 179 (N.), the case of Curling vs. Long, 1 B. and P. 634, is considered unsound. The author says: " It is said in Curling vs. Long, that " before the ship breaks ground, the ship owner has no lien for " freight; but, notwithstanding this case, it is now well settled " that as soon as he has the goods on board, and perhaps as soon " as he has taken charge of them, he has a right to retain them, " and carry them on."

The case of Curling vs. Long is, perhaps, well enough decided, because, although the vessel had not broken ground when captured, yet on the recapture, she was taken into Port Royal, and the ship and cargo sold by order of the Admiralty Court, without opposition. The proceeds of sale of the goods were remitted to the defendants in England, as agents for the several owners of goods on board, and the master, who made no claim for freight in the Admiralty Court at Port Royal, brought suit in England against the agents of the cargo owners, claiming payment out of the proceeds of sale in their hands.

The master must have assented to the sale, because his claim for a portion of the proceeds was in affirmance of it, and the case, as reported, discloses no dissent on his part, or offer to forward the cargo, when his vessel was sold at Port Royal.

The case of Curling vs. Long was decided in 1797, and has not been accepted by modern text writers as satisfactory.

In Hayes vs. Campbell, 55 California, R. p. 424, it was expressly decided that the ship owner has a lien on the cargo for freight as soon as it is put on board, and that the cargo owner cannot receive possession without paying the freight agreed on, although the vessel had not broken ground, or commenced the voyage.

In the case of Buckley vs. Cotton Company, 24 How. 392, this Court held that "after the delivery of the cargo, and accept-
"ance at the place of shipment, the shipper had no longer any
"control over the property, *except as subject to the stipulated*
"*freight.*"

In that case the court said, there was no difference between the case of the delivery of the goods into the hands of the master at the wharf for transportation on a particulur ship, in pursuance of the contract of affreightment, and the actual loading of the goods on board the vessel; in both instances the cargo is in the custody of the master, and a physical connection between the cargo and the ship is unnecessary, the lien of the ship owner

attaches where the cargo is delivered to the master for shipment before it reaches the hold of the vessel.

The lien for freight is a mere right to retain possession of the goods until the freight is paid; "it is not in the nature of an "hypothecation, which will remain a charge upon the goods "after the ship owner has parted from the possession, but is "analogous to the lien given by the common law to the carrier "on land, who is not bound to deliver them to the party until "his fare is paid, and, if he delivers them, the incumbrances of "the lien do not follow them in the hands of the owner or con-"signee It is nothing more than the right to withhold the "goods, and is inseparably associated with his possession, and "dependent on it."

Such is the view of the ship owner's lien for freight, as expressed by this Court in 1 Black, 112. Bags of Linseed, and in 5 Wallace, 555, Bird of Paradise.

It is, therefore, plain that the right of the ship owner, at the port of outfit, to retain possession of goods delivered by the shipper to the master, for transportation, until the agreed freight is paid, and the master indemnified against the consequences of bills of lading signed by him, is a maritime lien, and "the legal "effect of such a lien is, that the ship owner, as carrier by water, "may retain the goods until the freight is paid, or he may en-"force the same by a proceeding *in rem*, in the District Court." 5 Wall. 555, Bird of Paradise.

The case of Jordan vs. Warren Ins. Co., 1 Story, 355, is in some respects similar to this; in that case the vessel left the wharf at New Orleans, loaded with cotton and tobacco, on her way down the river, in tow of a tug, and before reaching the bar, the ship was damaged; the cargo was taken out and carried back to New Orleans. The ship, after about six months' delay, was repaired and fitted for sea. The cargo, however, on the advice on experts, was sold without opposition on the part of the master.

The ship owner sued the underwriters on freight for loss of freight resulting from the accident, and the consequent sale of the cargo at New Orleans, the port of outfit.

Mr. Justice Story said: "The whole evidence shows that "the cargo could have been dried, sorted, and repacked safely "for the voyage, at the farthest, within six months. Mere delay "in the voyage, or disappointment as to the time of arrival, con- "stitutes, as we have seen, no ground for an abandonment of the "voyage. So that here the loss of freight has been by a volun- "tary abandonment of the voyage by the master, and not from "necessity, superinduced by any perils insured against. Then "how stands the case as to the shippers of the cargo? *They "could not require the cargo to be redelivered to them without the pay- "ment of freight for the voyage, and if they did not choose to pay the "freight, the master had a right to retain the cargo for the payment "thereof, or to prepare it again for reshipment, as soon as it could be "safely done, unless the owners refused to allow it to be again shipped "on the voyage. If they did so refuse, then the contract for full "freight would have been complete on the part of the ship owner from "the default on the other side.*"

In the case of Pearson vs. Gorchen, 17 C. B., N. S., p. 370, Mr. Justice Williams said: "The law does not admit of any "doubt that the charterers having shipped the goods, had no "right to require them to be unshipped. It was the captain's "duty to retain them for the benefit of his owner, by way of "lien, for the sum which would become due in respect of freight "*to be earned* under the charter party."

In the same case Mr. Justice Willis informs us that under the Spanish Code a shipper, on a general ship, may require un- shipment at the port of loading upon payment of half freight, and all expenses of unstowing and restowing, but subject to an option on the part of the other shippers to purchase his goods at the invoice price, instead of allowing him to unload them.

Art. 291 of the French Code de Commerce makes a similar provision in case of unshipment of goods at the port of loading.

The original shippers of the cotton on the Tornado took no part in her affairs after the accident occurred; the underwriters on cargo, as abandonees of the consignees or holders of the bills of lading, interfered, and by their conduct prevented the forwarding of the cotton to its destination. (See their intervention filed 19th March, 1878, p. 16).

"By the abandonment of a cargo to insurers, the owner puts "them in his place, and they become the only parties to receive "the goods. A delivery to them is as valid, for the purpose of "earning freight, as a delivery to the owner would have been "had there been no abandonment. The owner of the cargo can- "not, by abandoning to his insurers, disable the shipowner from "earning freight. The distinction, therefore, between the cargo "reaching the owner and its reaching his abandonees, is not "tenable. The only effect produced by the shipowner voluntarily "surrendering the cargo to the abandonees, without payment of "freight, where freight was due, or he might have earned it, would "be that if he took no measures to protect it, he might lose his "lien; but if he lost his freight by that means, it is very certain "that he could not resort to the insurers on freight." Hubbell vs. Ins. Co., 74 N. York, R. 251. These abandonees opposed the bonding of the cotton by the captain, because, as stated in the tenth finding, it was to their interest "that said cotton should "be sold by the Marshal as it came out of the ship, and that said "master should not be permitted to bond said cotton."

But the interest of the insurers on freight, is expressed by the petition filed on their behalf, pp. 14, 15.

The petition avers, "that not only has the master of said "ship Tornado, as also the owners thereof, the right to carry "forward said cargo, and to earn freight, but petitioners' prin- "cipals, to wit: the subscribers at Lloyds, who have insured said "freight, have the right to insist that the same be carried for- "ward, and freight earned by said ship!"

"That it has not been shown, nor can it be shown, that the "said ship Tornado cannot be repaired within a reasonable

"time, so as to be able to carry forward said freight; that it has "not been, nor can it be satisfactorily shown, all the evidence "considered, that it is for the interest of all parties to sell said "cargo as it lies on the wharf, without any examination, inspec- "tion, or ascertainment of actual damage suffered; that such "sale would be premature, unwise, and necessarily result in a "great sacrifice, the real condition of said cotton composing said "cargo being unknown; that about one tenth of said cargo, to "wit: about five hundred bales of cotton, for which bills of lad- "had been signed, are almost, if not entirely uninjured, and "that, from the appearance of the cotton already taken out of "said ship, it is reasonable to suppose that, at a cost trifling as "compared with its real value, said cotton can be dried and pre "pared so as to be forwarded to its destination, therefore, "petitioners, for their principals aforesaid, oppose the sale "thereof.

"That petitioners are informed, and believe, that several of "the underwriters on said cargo, who oppose the rescinding of "said order of sale, are stockholders in the corporation of said "New Harbor Protection Company, or in other boats which "claim to have rendered salvage services to said ship Tornado, "and are directly interested in the salvage claimed by libellant, "and expect to participate therein, and, hence, have united with "said libellant to urge the sale of said cargo here, with utter "disregard of the rights of the master and owners of said ship "and cargo, and of the insurers of said ship and freight."

It is well settled that an actual loss of freight arises only when the circumstances are such as to render the ultimate earning of freight absolutely impossible or practically hopeless; as when the cargo itself is lost, or there are no means of forwarding it, in case of the loss of the vessel, or similar decisive circumstances. "The mere loss of the vessel, short of her destina- "tion, does not produce that result, for the master or ship owner "may still earn his freight by forwarding the cargo to its "destination by other means of conveyance, and *it is his duty to*

"*the insurer on freight to do so.* The question whether in case of "accident to the ship, the loss of freight is total, does not depend "on whether the ship is totally lost, but upon whether there is "a chance of being able to earn the freight by forwarding the "cargo."

Hubbell vs. Ins. Co., 74 N. Y. 252.

Shipton vs. Thornton, 9 Ad. and El. 334.

Kidston vs. Ins. Co., L. R. 2. C. P. 387.

Hugg vs. Banking Co., 7 How. 595.

Where there is an actual or constructive total loss of the vessel, the ship owner may claim as for a total loss, by giving due notice of abandonment of freight to the insurer, who is then empowered, as representative of theship owner, to take all the measures which he might have taken to save freight. But where the circumstances are not such as to justify an abandonment of freight, or being such, yet the ship owner omits to abandon, it is well settled that it is his duty to make all reasonable efforts to forward the cargo, and his omission to do so precludes a recovery for a total loss, and in some cases any recovery. As to the insurer on freight, or where the ship is disabled, the ship owner should either himself complete the performance of his contract of transportation and earn the freight, or by a timely abandonment enable the insurer, if he choose, to perform it for his own benefit. Hubbel vs. Ins. Co., 74 N. Y. 253.

But the abandonment of the ship does not interfere with the performance of the duty to transship the cargo and earn freight; nor does an abandonment of the cargo deprive the ship owner or his insurer on freight of the right thus to earn freight. He has a lien on the cargo for the purpose of earning freight which is paramount to the rights of the abandonees of the cargo. Ind. pp. 257-8.

And it is only where the cargo is carried to its destination in the original ship, that any part of the freight goes to the abandonee of the ship. If the transportation is completed by

a substituted vessel, the original vessel being wholly disabled, the original owners are entitled to the freight, and not the abandonees of the ship. The abandonment of the ship therefore, does not divest the ship owner of the power to earn freight or to abandon to the insurer on freight.

Id. p. 261; Hickie vs. Rodocanachi, 4 H. & N. 455.

There is no doubt, also, that the extra expense incurred in saving and preparing the cargo for reshipment would fall on the owners of the cargo, and the ship owner, if he had been allowed to perform his contract, would have been entitled to collect his whole freight, and, in addition, to be reimbursed the expenses incident to transshipment, and the preparation of the cargo for reshipment.

Hubbell vs. Ins. Co., 74 N. Y. 258.

There is no doubt, also, that if the owners of the goods, or their insurers, take charge of the goods at the place of disaster, the master may still earn his freight by offering to carry on the goods. If the owners of the cargo insist on taking it, they must then pay full freight.

Hubbell vs. Ins. Co. 74 N. Y. p. 256.

Could the cargo of the Tornado have been picked, dried, rebaled and reshipped?

The eighteenth finding of the court answers the question.

It finds that 1185 bales of the damaged cotton, "part of the "said cargo, were shipped by the purchasers at the marshal's "sale, coastwise, and to Philadelphia and other cities of the "Northern States in the condition it came from the ship; that "2895 bales of said damaged cotton were sent to the pickeries, "picked, dried, rebaled and shipped; 2446 bales of said cotton "to Liverpool, and 450 to Philadelphia; that all the damaged "cotton taken from said ship was unmerchantable cotton even "after it had been picked, dried and rebaled, that is, it could "not be used for making cotton cloth, but could only be used "for making felt hats, paper, wadding, and such like articles,

"having lost, by the submersion and drying, a large part of its "natural oil, its fibre being injured, and its weight reduced."

It appears then that 523 bales were sound and uninjured; that 2896 bales were actually picked, dried, rebaled and reshipped to Philadelphia and Liverpool; that 1158 bales were shipped coastwise to Philadelphia and other Northern cities, but to what extent they and the remaining 591 bales were damaged, does not appear; the eleventh finding states that all the cargo was more or less damaged except the 523 bales of sound cotton; the extent of the damage, as stated in the eighteenth finding, was such as to render the cotton *unmerchantable*, that is to say, it could not be used for making cotton cloth, but could only be used for making felt hats, etc., having lost a large part of its natural oil, and its fibre being injured.

It is nowhere intimated that the cotton did not exist in specie as cotton, and that all of it could not have been picked, dried, rebaled and reshipped.

In the early stage of the case, the Trinity Master, appointed by the court, reported to the court that he valued 164 bales, at $38 per bale, 155 bales, slightly damaged, at $35 per bale, and 180 bales at $36 per bale, p. 8. He appraised the 150 bales of sound cotton at the press at $18,000, or $36 per bale, p. 9. He also appraised the damaged cotton at $28 per bale, if damaged by water only, and at $24 per bale if damaged by fire and water, p. 7.

These figures are justified by the sales which were subsequently made. In the seventeenth finding, p. 40, it appears that 523 bales of undamaged cotton, were appraised at $19,100, or $36 50 per bale, while the balance of the cargo sold for $116,000, or about $24 82 per bale; demonstrating that the damaged cotton was worth within $11 70 per bale as much as the perfectly sound. To this must be added, the cost of picking, drying and rebaling, an expense to be borne by the owners of the cargo, but to be considered in arriving at the value of the cotton when delivered at the port of destination.

It is manifest, that the entire cargo could have been forwarded to its destination, had the master been allowed to incur the expense of putting it in order for that purpose, and the interest of the cargo owners alone was consulted, in directing the sale of the cotton in New Orleans.

The cases of Jordan vs. Ins. Co., 1 Story, 342, M'Gaw vs. Ins. Co., 23 Pick, 405, and Hugg vs. Ins. Co., 7 How., settle the doctrine, that the master has a right to carry on the cargo to its destination so long as the goods have not lost their original character, or remain in specie; and if the process of preparing the cargo for transshipment, such as picking, drying, and rebaling the cotton occasions delay, the cargo owner must wait.

Saltus vs. Ocean Co., 14 John., 138.

Clark vs. Ins. Co., 2 Pick., 104.

2 Parson's Maratime Law, p. 388.

This doctrine applies where the ship, after sailing, puts back in a damaged condition to her original port of departure.

2 Parson's Maratime Law, p. 388.

Lord vs. Neptune Ins. Co., 10 Gray, 115

It is not found by the court, nor is it pretended, that this cargo of cotton could not have been picked, dried and rebaled in a reasonable time, at reasonable expense, and that its value, after arrival at the port of destination, would not have exceeded the freight and all other expenses. The fact is found that a large part of the cargo was actually picked, dried, rebaled and shipped by the purchasers to Liverpool, and the inference is that the whole cargo could have been similarly dealt with. But as between the ship owner and the shipper of the goods, the value of the goods at the port of destination, is immaterial.

The sole answer to the case made by the libellants is, that at the time of the disaster the vessel was in port, and had not commenced to earn freight because she had not broken ground or started on her voyage.

In effect it is alleged that the disaster at the port of outfit, occurring before the vessel starts on her voyage, dissolves the

contract of affreightment, although such would not be the case if she had commenced to earn freight. There is no logic, and there is less equity in such a rule of law, and no case can be found to support it, unless it be that of Curling vs. Long, 1 B. & P. 634, decided nearly a hundred years ago. I have already criticised that case, and invited attention to the opinion of text writers respecting its authority. It was cited in the case of Hayes vs. Campbell, 55 Calif. 424, and disregarded by the court in coming to its conclusions. The case of the Kathleen, L. R 4 A. & E., and the Cito, 7 Prob. Div., both cases of derelict, put the dissolution of the contract, not on the ground that the disaster dissolved the contract, but that the abandonment of the vessel by the master, with no intention to resume possession, gave the cargo owner the option to treat the contract of affreightment at an end; *provided the cargo owner exercised his option before the master manifested an intention to take possession of and forward the goods.*

The case of the Nathaniel Hooper, 3 Sumner, 543, does not go as far as the English cases just mentioned, for in that case the vsssel being bound on a voyage from Havana to St. Petersburg, struck on the Nantucket Shoals, and after jettison of a part of her cargo, consisting of sugar, was abandoned by the master and crew; the ship afterwards floated off the shoals, and was met and brought into port by salvors, and there libelled for salvage.

The court allowed pro rata freight on the sugars delivered to the underwriters, and upon those detained in the custody of the court, upon the ground that there had been a *mutual dispensation by both parties*, of any further prosecution of the voyage. Mr. Justice Story said: "And I think the whole of the cases in "which full freight is upon the ordinary principles of commer- "cial law due, notwithstanding the non-arrival of the goods at "the port of destination, may be reduced to a single statement, "that the non-arrival has been occasioned by no default or in- "ability of the carrier ship, but has been occasioned by the *de- "fault or waiver* of the merchant shipper. In the former case

"the merchant shipper cannot avail himself of his own default "to escape from the payment of freight; in the latter case he "*dispenses with the entire fulfilment of the original contract for his* "*own interest and purpose.*"

The insisting on receiving his goods at an intermediate port is given by the court as an instance in which the shipper of cargo must pay full freight. Further on, in the same case, p. 557, Justice Story says: That if the contract is to be considered dissolved by the common calamity, both parties are released from their obligations, and no freight whatever is due, but that the desertion of the ship, when she struck on the shoals, did not dissolve the contract of affreightment, and, as the owners of the cargo were not upon the spot to bond it, and as the underwriters on part of the cargo abandoned to them, did not obtain delivery of it on bail until it was too late in the season to forward the cargo to St. Petersburg, they relieved the vessel from any duty to carry it on; and, on the other hand, as the vessel had been repaired and tendered on 30th July, and then voluntarily sold before the cargo was released on bail by the underwriters, this voluntary sale was a discontinuance of the offer to carry on the cargo, because the ship owners had no right to substitute any other ship in her stead.

The right of substitution exists only when the change is justified or required by necessity, and not where the ship owner voluntarily, and from choice parts with his power over and control of the ship. In the case just cited, there was no attempt on the part of the master to obtain delivery of the cargo on board.

It is true, that no freight is due where the cargo is brought back to the port of shipment, and is there sold by the master, because the goods were in a condition that would endanger the safety of the ship and the lives of the crew, if they were carried forward, as was held in Miston vs. Lord, 1 Blatchf. 257; but in such case the voyage is broken up, by the act of the master or the interest of the ship owner, as well as for the benefit of the cargo. But in the case at bar, the master resisted the sale of the

cargo, demanded the delivery of the cargo to him, that it might be put in condition to be forwarded, applied to the court to deliver it to him on bond, and the voyage was broken up by the owners of the cargo, acting for themselves and in their interest. The presence of the owners of the cargo on the spot, to act for themselves, prevented the creation of an agency for them, which the law in their absence imposes upon the master in case of necessity; the abandonees represented the cargo, and the master represented the ship and freight; each party stood upon his rights; so that the naked question is: Was the contract of affreightment, under the circumstances, dissolved by the operation of the law? It is clear that similar circumstances do not dissolve the contract if they happen at an intermediate port. Why should a more potent effect be given to them, because they happen at the port of outfit?

An embargo, although it may endure two years, does not dissolve any maritime contract.

Hadley vs. Clarke, 8 Term R. 259

But a voyage, broken up after its commencement, by war, or interdiction of commerce, dissolves the contract, and the right to freight is gone. On the other hand, a blockade of the port of departure, subsequent to the lading of the vessel, does not dissolve the contract, but a blockade of the port of destination has that effect.

Palmer vs. Lorillard, 16 Johns. 356;

Scott vs. Libby, 2 Johns. 336.

Suppose, in this case, the cargo of cotton to have been uninjured by the accident, would not the master have had the right to repair his vessel and take the cargo on, although the repairs might exceed her value when repaired? The freight money might induce him to adopt such course? How does the damage to the cargo affect the right of the parties, where the damage is of such character that the merchandize remains in specie, and can be forwarded so as to be of sufficient value at the port of destination to pay freight, and all expenses of transship-

ment, and something more besides?

In the case of the Propeller Mohawk, 8 Wall. 161, the court seems to make no distinction between "the port of disaster" and "an intermediate port," although the terms, port of disaster, would include the port of outfit.

In that case the insurers, with the assent of the master, took possession of the cargo at an intermediate port, and sold it; the court held that by the voluntary acceptance of the cargo, the master was entitled to pro rata freight, and the vessel was discharged from all liability, even if it was disabled by a peril or accident not within the exceptions of the bill of lading. In the case at bar, no question of pro rata freight arises, because the master not only refused to allow the underwriters to take possession of the cargo, but insisted on his right to transship.

I have passed over the exception contained in the answer of the underwriters, filed 1st May, 1878, p. 27, because our right to proceed by an independent libel is recognized in the case of the Sybil, 4 Wheat. 99. On the authority of this case, the District Court disjoined the suit for freight from the salvage suit, and rescinded the order by which the two suits had been consolidated.

As to the right of the master to bond the cargo at the time he applied to the court for that purpose, it is clearly conferred by the Act of 1847, re-enacted as section 941 R. S.

When the underwriters became owners by abandonment, they had a right to the property on payment of freight, and as the order of the court to sell the cargo had reserved the right to freight, the master of the ship ceased to have any interest in the question of bonding the cargo. We ask for a decree reversing that of the Circuit Court, and allowing the full amount claimed, with interest, from 1st March, 1878, and costs of suit.

Respectfully submitted,

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